Number [redacted] 63

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1923.

JAMES C. DAVIS, AGENT OF THE PRESIDENT UNDER SECTION 206 OF THE TRANSPORTATION ACT 1920, PETITIONER,

V.

JOHN O'HARA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF RESPONDENT.

JOHN O. YEISER,
JOHN C. TRAVIS,
Attorneys for Respondent.
BENJAMIN S. BAKER,
Of Counsel.

WEKESSER-BRINKMAN CO., Law Briefs, Lincoln, Neb.

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STATEMENT CORRECTIONS.

It is a fundamental rule of law that, in reviewing sufficiency of evidence to constitute a cause of action on motion to direct

a verdict every controverted question must be resolved in favor of plaintiff and he be given the benefit of every inference that reasonably can be deduced from the facts in evidence.

Notwithstanding this rule of law, petitioner, occupying that position, presents to this court a statement wherein every controverted question of fact is resolved to the contrary in petitioner's favor. In fact, he has gone further and indulged in inferences—some of which are based wholly upon mental operations and thoughts of witnesses and some not even on that much foundation, but are contrary to the evidence.

Petitioner's offense in this respect in stating the case is so general that to attempt to straighten out the story would be more involved and confusing and take more space than to restate the story.

The action is brought under the Federal Employer's Liability Act for damages growing out of the explosion of a detonator (blasting cap) in which respondent lost his sight.

John O'Hara, respondent herein, a boy of eighteen years (Rec. 45, Q. 101), was employed by the Petitioner as a member of the "gantry" crew (Rec. 53, Q. 228-229; Rec. 44, Q. 89). This "gantry" is a huge derrick crane of which Exhibits 4 and 5 (Rec. 52) are good pictures (Rec. 54, Q. 237-238). It straddles two sets of parallel tracks (Rec. 52, Q. 20-23) and itself sets upon rails which are about two feet high (Rec. 54, Q. 245-247). It is used to transfer the contents of bad order cars en transit to good order cars (Rec. 40, Q. 23; Rec. 61, Q. 372), or, in event the car is in good order but the load shifted and in need of adjustment, to adjust such loads (Rec. 61, Q. 374), such as tractors, automobiles, engines, guns, etc. (Rec. 61, Q. 376-377).

While it may be occasionally used for intrastate shipments (no record of any such) still it is used regularly for interstate shipments (Ans. Rec. p. 17, Rec. 61, Q. 380).

The operation is to place the bad order car on one of the parallel tracks and alongside a car in good order. Slings are placed about the shipment, hooked from the gantry hoist, and operated so the load is raised clear of the bad order car —run over the good order car and lowered therein (Rec. 40, Q. 21-22). Without such sling the gantry is not complete for use (Rec. 91, Q. 802-807). Dependent upon the character of the shipment, rope, cable or chain slings are used. On wooden objects, such as poles and lumber, a cable sling is used (Rec. 92, Q. 810-814).

The gantry is kept in working order by the gantry crew (Rec. 92, Q. 816) and a tool house maintained nearby where repairs such as a surplus of rope, chains and cable is kept to make and repair slings (Rec. 96, Q. 878-870, 882; Rec. 98, Q. 907-908), as well as other repair material (Rec. 96, Q. 882). These slings frequently wear out (Rec. 92, Q. 804-809).

The gantry was operated and maintained by a crew of five men, consisting of the following: Turner, foreman and gantry-operator (Rec. 53, Q. 232) and respondent, Ed. O'Hara, Charles Berg and Francis O'Hara (Rec. 53, Q. 230).

On the day of the accident the crew had transferred the contents of a car of sheet iron (Rec. 62, Q. 381) to a good order car. This sheet iron had been in a coal car (Rec. 62, Q. 393) and there was a little coal in it (Rec. 62, Q. 393). While unloading it, Ed had noticed some wire (Rec. 62, Q. 394). After it was unloaded the car remained but a short distance from the gantry (Rec. 54, Q. 254). This shipment was in transit from Black Rock, N. Y., to Tacoma, Washington (Ans. Rec. 17).

A shipment of telephone poles enroute from St. Paul, Minnesota, to St. Edwards, Nebraska, (Ans. Rec. 17), then about 300 yards away was next to be handled (Rec. 95, Q. 862-863; Rec. 96, Q. 873) and the crew proceeded to work

on it (Rec. 96, Q. 874). This was a load properly to be handled by a cable sling (Rec. 92, Q. 810-814), as chains would scar the poles (Rec. 55, Q. 263) and rope was not strong enough (Rec. 55, Q. 263). There had previously been a cable sling, but this had been broken (Rec. 189, Q. 1705; Rec. 92, Q. 810; Rec. 96, Q. 883). The foreman directed the crew (Rec. 41, Q. 36-37) as a matter of repair (Rec. 96, Q. 888) to make a sling from a piece of cable previously used on the gantry (Rec. 55, Q. 266) and kept in the tool house for such purpose (Rec. 98, Q. 908, to replace the previous cable sling as a part of, and in order to prepare, the gantry for handling the car of poles as well as future lumber loads (Rec. 92, Q. 810, 814; Rec. 189, Q. 1704; Rec. 96, Q. 887). Accordingly the cable was taken from the tool house and cut (Rec. 41, Q. 33-35), clamps put on it, and attached to the gantry (Rec. 42, Q. 50). They all busied themselves (Rec. 58, Q. 317-318; Rec. 99, Q. 921-922).

That the men would not injure their hands upon the two jagged cable ends in handling the sling the foreman directed that cloth be bound thereon (Rec. 94, Q. 846; Rec. 94, Q. 415-418; Rec. 42, Q. 59). Cloth was found. There was no binding wire in the tool house (Rec. 56, Q. 283; Rec. 92, 823-824) and this fact was reported to the foreman (Rec. 42, Q. 63; Rec. 92, Q. 823). Thereupon the foreman directed the gang to find some wire (Rec. 42, Q. 64-65; Rec. 93, Q. 826; Rec. 64, Q. 419). Ed, remembering the wire in the coal car, stated to the foreman he knew where there was a piece he thought would do—that he had seen some in the coal car (Rec. 56, Q. 287). Ed climbed in the coal car and got it (Rec. 56, Q. 288) showed it to the foreman, asked him if it would do, to which the foreman said yes, that probably they would have to be careful or there would not be enough of it to do the work with (Rec. 43, Q. 68). The foreman, when the wire was exhibited to him was not over four or six feet from Ed (Rec. 57, Q. 300; Rec. 43, Q. 69) and his directing its use with the expression as to quantity was

plainly heard by Respondent and the other workmen (Rec. 57, Q. 299; Rec. 64, Q. 420). Respondent, however, had no knowledge as the source from which the wire was procured until after the accident (Rec. 43, Q. 66-67).

This wire was about the size of an ordinary cord string. There were two pieces of wire, each about 3 or 4 feet long, with a small copper tube; cylindrical in form and about an inch long and the circumference of an ordinary pencil (Exhibit 3, Rec. 65; Rec. 65, Q. 428-433).

It is admitted, both in the answer (Rec. 17) and conceded throughout the trial that the foreman made no inspection, test or investigation in regard to the cap on the end of the wire.

Ed made an unsuccessful attempt to twist the wire from the cap; then laid the wire across a rail and cut off a portion with a hammer. While twisting, yellow powder, like flour, came out of the cap and this he spoke of after the accident but not before (Rec. 51, Q. 192-193; Rec. 65, Q. 435-439). The piece of wire cut off was used and then Ed cut a second piece off, using the same method of cutting it, with a hammer (Rec. 66, Q. 451; Rec. 67, Q. 470). In cutting the wire two straight strands were left, each about 4 or 5 inches long, plus an undetermined additional amount crumpled and twisted about the cap by Ed's twisting (Rec. 43, Q. 72; Rec. 66, Q. 452). In cutting the second portion Ed held the cap and extreme end of wire both so as to form a loop and hence neither piece fell to the ground when cut (Rec. 76, Q. 608-613). Ed made no investigation, inspection or test of the cylinder (Rec. 67, Q. 460-464) and did not know what the cap was (Rec. 69, Q. 491-492). After cutting off the second portion of wire, Ed dropped the hammer and walked some ten feet toward the cable (Rec. 67, Q. 473-477), met John and handed the remaining twisted portion of wire to him (Rec. 67, Q. 458). Respondent took it, at a point ten or twelve feet from the hammer (Rec. 68, Q. 477),

proceeded to straighten the wire, testifying (Rec. 43, Q. 73): "I though that if they would not have enough of the wire, that what was left there could be used, and I took the piece that my uncle gave me and tried to straighten it out, the part that he crumpled up, and when I did that I sat down on the rail which the gantry runs on (about 18 inches high), and I had the cylinder part in my left hand and the end of the wire in my right hand, and as I went to pull this out and straighten it the cylinder slipped out of my left hand and struck on the rail. My hands were close to the rail when I was pulling." The cylinder exploded when it struck the rail (Rec. 43, Q. 74), blowing Respondent's eyes out (Rec. 43, Q. 75). He had the wire less than a minute before the explosion (Rec. 45, Q. 103). His act of pulling the wire was to straighten it for use in binding the cloth on the cable (Rec. 44, Q. 84-85).

The force of explosion dented the rail so Ed could very nearly lay his little finger in it (Rec. 70, Q. 502-509). Particles flew some six feet and struck Berg (Rec. 99, Q. 933-936).

At the time of the accident but one cloth had been bound on the cable (Rec. 69, Q. 499) and there remained one to be put on (Rec. 69, Q. 450). At the time of the explosion everybody was busy working (Rec. 58, Q. 317-318). The day was hot with the sun shining (Rec. 56, Q. 290-293).

The cylinder was a "detonator" or "blasting cap" used in mines as a starter for high explosives (Rec. 121, Q. 1204), which are correctly exploded by detonation—the detonator being first exploded and in turn exploding the dynamite. The explosive in these detonators is fulminate of mercury. Bulletin No. 80, Bureau of Mines, United States government publication, says of these detonators (Rec. 79):

> "In the description of mercury fulminate attention was called to its extreme sensitiveness to heat, friction, or blows, and to the extreme violence of its explosion.

All these properties therefore belong to detonators and electric detonators, and these devices should be treated with the utmost respect. Never attempt to pick out any of the composition. Do not drop them or strike them violently against any hard body. Do not lay them on the ground where they may be stepped on. Do not step on them. In crimping, take the greatest care not to squeeze the composition and never crimp with the teeth, for there is enough composition in one of these small capsules to blow a man's head open.

* * * * *

"When carried or shipped they should be packed firmly with a quantity or elastic material, such as felt or the coiled legs of the electric detonators, about them, and *they should not be exposed to heat, blows or shocks of any kind.*"

In tests detonators exploded less than two feet from a lead plate have perforated the lead plate (Rec. 128, Q. 1302) and particles of the jacket occasionally fly 20 to 30 feet (Rec. 129, Q. 1305). The explosion is very dangerous (Rec. 128, Q. 1300).

Mercury fulminate is very sensitive to shock, heat and friction (Rec. 133, Q. 1382-1383), and is the most sensitive explosive used commercially (Rec 181, Q. 1578).

PRELIMINARY QUESTION.

Improper Appeal and Non-Federal Questions.

Before we take up the questions presented by Petitioner there is one point we wish to call to the attention of the court for the reason that from this suggestion the court may find it proper to affirm the decision of the court below without the necessity of going into the propositions presented by Petitioner. If the question discussed in this preliminary argument be sustained there would be no federal question left in the case.

There were two trials and two appeals to the Supreme Court of Nebraska before certified to this court.

Petitioner brough up for review only the judgment and second trial proceedings. The proceedings on first trial he purposely omitted as shown by affidavit of Clerk of Supreme Court of Nebraska (p. 3, motion of Respondent for quasal and dismissal of writ of certioari) and by Petitioner's brief resisting Respondent's request for certiorari for first record. *Respondent* then brought up by supplemental record only portions of the first trial proceedings which show Petitioner to have waived the venue objection on first trial which would destroy the right to interpose such a privilege in subsequent trials.

The questions of whether Respondent was injured by Petitioner's negligence; whether he had assumed the risk; whether Petitioner was engaged in interstate commerce; whether the venue objection was waived by failure to cross-appeal were all finally determined on first appeal.

On the second appeal of this action Petitioner sought to review these same holdings adjudicated on first appeal. The Supreme Court of Nebraska refused to permit a review of these settled questions, holding that such review should have been sought upon motion for rehearing at the time of the first appeal; that the questions had become *res adjudicata* and the law of the case. No new or different decision was rendered on second appeal upon any of these questions nor were they considered nor mentioned other than to apply the rule, *law of the case.*

A single exception exists to this statement and that is in reference to the venue question. This was discussed from several different angles and several specific waivers of the objection noted. The Supreme Court of Nebraska disposed of the question upon the specific grounds that the former opinion, holding this question to have been foreclosed by

failure to cross-appeal, *was also settled under the law of the case* (Rec. p. 202).

Insofar, then, as all questions arising *on first trial* and disposed of on first appeal are concerned they are not proper questions and especially to review in this court under the second trial records procured by Petitioner. Without having obtained a writ of certiorari to review the first trial or any rulings therein, but confining himself to the last trial, Petitioner asks this court to hold that all the findings of the Supreme Court of Nebraska on the *first appeal were* erroneous. Petitioner asks the court to base its review of first trial questions—not on the first trial proceedings—but *upon those of the second trial.* Petitioner's position is a very novel one. How can this court say that the record of evidence on first appeal does not show Petitioner to have been guilty—as found by the Supreme Court of Nebraska—of "culpable negligence?" How can this court say that the first trial record did not show Respondent to have been engaged in interstate commerce and to not have assumed the risk? How can this court say that the Supreme Court of Nebraska erred in its holding that Petitioner failed to perfect a cross-appeal upon the venue question and that by reason thereof waived such objection even if properly made?

Another thing of great importance faces Petitioner. That is the decision on second appeal merely applying the rule *law of the case* to these questions *was not the decision of any federal question.* This was a decision upon a non-federal ground —one of general practice.

We will now treat the matter above discussed by analysis.

(a) *Proceedings on first trial and appeal not reviewable because not appealed from.*

The decision upon these questions upon first appeal was final within the meaning of Section 237 of the Judicial Code. A review of these points decided on first appeal can be had only by a review of the first trial proceedings. *Rio Grande*

Western Ry. Co. v. *Stringham,* 60 L. Ed. 136. This authority not only decides this point, but the two points following, *infra.* We, therefore, reserve quotation here to eliminate repetition.

(b) *The decision on second appeal applying the rule law of the case was a decision based upon non-federal ground and therefore not reviewable here.*

This point, as stated, was likewise decided in the *Stringham case, supra,* and also in the case of *Northern Pacific R. R. So.* v. *Ellis,* 36 L. Ed. 504.

(c) *The proper and exclusive method of reviewing the decision on first appeal was by motion for rehearing, as a foundation for further appeal.*

A rehearing cannot be had as a part of the second appeal, nor, indeed, at any time after the first appeal decision becomes final and mandate issues. This is established by a long line of authorities. We will set out excerpts from two of these authorities and cite additional ones in support thereof.

In *No. Pac. Ry. Co.* v. *Ellis,* 144 U. S. 458, this court reviewed the following holding of the Supreme Court of Wisconsin on second appeal:

> "But the decision of this court upon a demurrer upon the questions properly involved (on first appeal) cannot be reviewed by the circuit court, nor, indeed, by this court, save upon motion for rehearing. Such questions are finally decided and settled for that case, and, as between the parties to that litigation, for all time. This view of the law decides this case."

Also held in same case (p. 506):

> "The motion to dismiss the writ of error must be sustained. The decision of the Supreme Court of Wisconsin rested upon an independent ground not involving

a federal question and broad enough to maintain the judgment. *Hammond* v. *Johnson,* 142 U. S. 73.

"The Supreme Court held that by reason of its decision of May 20, 1890, when the case was presented to the court on the appeal of the railroad company from the order of the lower court upon demurrer, the rights of the parties were *res adjudicata,* and that it was itself, as the parties were, bound by its own former judgment. Its conclusion had been announced and its mandate had gone down, and it had no power upon a second appeal to review that judgment. This is the settled rule in Wisconsin * * * (citations) * * * and in this court. *Clark* v. *Keith,* 106 U. S. 464; *Chaffin* v. *Taylor,* 116 U. S. 567; *Peck* v. *Sanderson,* 59 U. S. 18 How. 42; *Hickman* v. *Fort Scott,* 141 U. S. 415. Under these circumstances the judgment of the Supreme Court is not subject to review here."

In *Rio Grande Western Ry. Co.* v. *Stringham,* 60 L. Ed. 136, this court passed upon the following holding of the Supreme Court of Utah:

"If counsel for appellant thought that this court, in the prior opinion, did not correctly define and determine the extent of appellant's rights to the land in dispute, or did not fully safeguard its rights as defined and adjudged, they should have filed a petition for a rehearing. This they did not do. The conclusions of law and judgment having been drawn and entered in conformity with the decision of this court, we are precluded from further considering the case. The former decision became, and is, the law of the case, and this court, as well as the litigants, are bound thereby."

Also held in same case:

"Being in doubt which of the judgments of the appellate court should be brought here for review to present properly the question respecting the nature of its title, the plaintiff concluded to bring up both, each by a separate writ of error. Manifestly the first judgment was final within the meaning of Judicial Code, Section 237 (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, sec. 1214). It disposed of the whole case on the merits,

directed what judgment should be entered, and left nothing to the judicial discretion of the trial court. *Tippecanoe County* v. *Lucas,* 93 U. S. 108, 23 L. Ed. 822; *Bostwick* v. *Brinkerhoff,* 106 U. S. 3, 27 L. Ed. 73, 1 Sup. Ct. Rep. 15; *Mower* v. *Fletcher,* 114 U. S. 127, 29 L. Ed. 117, 5 Sup. Ct. Rep. 799; *Chesapeake & P. Teleph. Co.* v. *Manning,* 186 U. S. 238, 46 L. Ed. 1144, 22 Sup. Ct. Rep. 881. And as the question sought to be presented arises upon the first judgment,—it being final in the sense of Sec. 237,—it is apparent that the writ of error addressed to the second judgment presents nothing reviewable here. * * * (citations) * * *."

In the syllabi of the Stringham case this court held:

"A decision of the highest state court, which, on a second appeal affirmed the judgment below on the ground that its former decision was the law of the case, is not reviewable in the Federal Supreme Court, where the federal question relied upon to confer jurisdiction was involved in the first decision and that decision was final in the sense of the Judicial Code, Section 237, governing writs of error to state courts."

We find in the two cases, supra, the exact questions presented by the case at bar. Questions decided on first appeal are *res adjudicata* between the parties.

Illinois ex rel Hunt v. *Ill. Cent. R. Co.,* 46 L. Ed. 440.

Chicago, B. & Q. R. Co. v. *Hull,* 24 Neb. 740.

Nothing previous to mandate can be reviewed on second appeal.

The Santa Maria, 10 Wheat. 431.

United States v. *Camou,* 184 U. S. 572.

United States v. *New York Indians,* 173 U. S. 464.

Pearce v. *Germania Ins. Co.,* 96 U. S. 461.

Meyer v. *Shamp,* 26 Neb. 729.

The above rule is in conformity with the well recognized rule that a case cannot be appealed piece-meal. Every point arising on first trial and not appealed is held waived on second appeal.

The proper and only method of correction of a decision
first appeal is by motion for rehearing. Review of first
peal cannot be had on second appeal.

Stevens v. *Templeton*, 174 Ind. 129.
Damon v. *DeBar*, 94 Mich. 594.
Ill. v. *Ill. Cent. R. Co.*, 46 L. Ed. 440.
Norfolk S. & R. Co. v. *Ferebee*, 238 U. S. 269.
Kidd v. *N. Y. Sec. Co.*, 75 N. H. 154.
Gainsville, etc. Assoc. v. *Atl. etc. R. Co.*, 157 N. C. 460.
Wright v. *Railroad*, 128 N. C. 77.
Jones v. *Railroad*, 131 N. C. 1333.
Boston Bar Assoc. v. *Casey*, 204 Mass. 331.
LaRoque v. *Kennedy*, 161 N. C. 459.
Holley v. *Smith*, 132 N. C. 36.
McWilliams v. *Drain. Dist.* 236 S. W. 367.

This is also the rule in Nebraska:

"If our former conclusion was erroneous, the defendant should have obtained a correction of the error by presenting a motion for rehearing * * *"
Home Fire Ins. Co. v. *Johansen*, 59 Neb. 349.

"No motion for a rehearing was filed, nor * * * any objection made to the decision of the court * * * the question will not be again considered * * *."
O'Donahue v. *Hendrix*, 17 Neb. 287.

*The refusal of an appellate court to review its first appeal
ision on second appeal where no rehearing was requested
be based upon the additional grounds of estoppel.*

Particularly, is this so in Nebraska.

Under the laws of Nebraska the right to file a motion for
earing is absolute and not—as in federal courts and some
er courts—a matter of discretion. Section D of Rule 8
the Supreme Court of Nebraska (172 N. W. p. viii) pro-
s:

> "All motions for rehearing * * * may be filed *as of course* at any time within 40 days from the filing of the opinion of rendition of the judgment * * *."

Rule 9 of the court (172 N. W. p. viii) provides:

> "MANDATES. No mandate will issue in any civil case during the time allowed for the filing of a motion for rehearing, or pending the consideration thereof, unless specially ordered by the court, or stipulated by the parties."

This was the situation under the laws of Nebraska. A decision had been written and filed. Petitioner was given the positive right of complaining of any errors therein by motion for rehearing. The issuance of a mandate was held up for a period of 40 days that he be given ample opportunity to complain. Petitioner knew that this decision would, unless complained of by motion for rehearing, at the end of 40 days become final and not reviewable after a mandate had been issued.

With this knowledge of the facts and law it became Petitioner's duty to request a correction of any error claimed by filing a motion for rehearing within the 40 day period, but he elected not to do this and permitted the decision to become final; *not by final decision of the court but by his own non-action* or without a word of protest.

By reason of these facts, after the mandate issued, he became estopped to complain of any errors. Had he used his remedy in the state supreme court by requesting a rehearing his status would have been different. The decision of the court would not have become final by acquiescence. He did not take the last decision granted by law. His conduct on first appeal indicated an attitude of saying to the Supreme Court of Nebraska, "you have given me opportunity to point out the error and ask a correction, but I will not do this.

I will ignore you and the Act of Congress and have a more direct decision in the Supreme Court of the United States."

All courts that have passed upon this question from the angle of estoppel have uniformly held that an appellate court will not review a decision by a lower court unless the lower court was given an opportunity, under its system of practice, of correcting the error. The remedies provided for its correction in the lower court must be exhausted—in other words, you must obtain the final or last decree of the highest court. Accordingly, the right of appeal is based upon the refusal of the lower court to *correct the error.* This is established by the following authority:

> "As a rule appeal or error will not lie from a judgment or decree or irregularities which may properly be corrected on petition or motion for a rehearing."
> Vol. 3 C. J. 337.

In note to *Wulzen* v. *Board of Supervisors,* 40 A. S. R. 17 (loc. note, p. 30) it is said:

> "It follows from the rule that certiorari issues only when there is no adequate remedy at law that among the questions which cannot be presented by it, where this rule prevails, are included all those which in the particular case might have been reviewed by appeal, writ of error, *motion for a new trial, or other appropriate proceeding of which the party might have availed himself either in the appellate court* or in the court in which the action against him was taken, provided such court had jurisdiction of him and of the subject-matter of the action or proceeding; nor can he maintain his claim to the writ on the ground that the time within which he might have appealed, or otherwise sought redress has expired, unless, perhaps, where he can show that his failure to avail himself of the remedy which he might have pursued was not due to any negligence or fault on his part. (Citing many cases)."

In *People* v. *Pilot Commissioners,* 37 Barb. (N. Y.) 126, the court applied this common law rule to failure to request rehearing.

The Supreme Court of Louisiana adopted this rule as a rule of court and in at least the three following cases the failure of the Petitioner to request a rehearing in the court below was decreed fatal to the granting of the writ:

Colomb v. *Rolling,* 106 La. 37.
In re Huddleston, 106 La. 594.
Frellsen v. *Ruddock Cypress Co.,* 108 La. 37.

Nor will the assumption be indulged that the Supreme Court of Nebraska would not have corrected error if such error existed:

> "• • • We cannot assume that that body will necessarily adhere to their previous decision; but on the contrary, must assume that if that body is convinced, on a rehearing, • • • that the former decision was erroneous either upon the facts or the law, it will promptly reverse its former decision • • •."
>
> *People* v. *Pilot Comm'rs., supra.*

As hereinbefore noted this requirement of a requested rehearing is contained in the cases of *Northern Pac. R. Co.* v. *Ellis,* and *Rio Grande Western R. Co.* v. *Stringham* and in the additional case of *Norfolk S. & R. Co.* v. *Ferebee,* 59 L. Ed. 1303-1305.

The conduct of Petitioner in accepting the decision on first appeal without objection or motion to modify or correct claimed errors was a waiver of such errors. As held by this court in *Richmond Min. Co.* v. *Rose,* 114 U. S. 576, and *Tripp* v. *Santa Rosa St. Ry. Co.,* 144 U. S. 126, a question waived in state court will not be reviewed here.

Petitioner recognizes the law to be as stated above and because of this seeks to lead this court into the belief that these questions were not determined on first appeal. Accordingly, at pages 31 and 32 of his brief he quotes the following from the opinion of this case on first appeal, to-wit:

> "In the present state of record it does not appear necessary to determine whether defendant was guilty of actionable negligence in failing to provide suitable wires, repairs, tools and machinery for the operation of the gantry * * *."

He claims and argues that this excerpt affirmatively shows the question to not have been determined but reserved. However, a continuation of that quotation where Petitioner leaves off, discloses the Supreme Court of Nebraska held:

> "* * * Passing over *these allegations* of negligence *for the present* let us mention what *appears* to have been *palpable negligence* on the part of the fellow workman (and his negligence was the negligence of defendant) in handing this explosive to plaintiff."

Continuing, the court analyzes the testimony and holds Petitioner to have been guilty of palpable negligence in the manner alleged in the petition.

While in the case at bar the Supreme Court of Nebraska discussed the venue question on second appeal, yet in deciding this question it applied the rule "law of the case" thereto, saying (Rec. p. 202):

> "No motion for rehearing was made in this court after the filing of the former opinion in this case and the former decision of the court has become the law of the case."

This was a decision of the venue question based upon the very facts involved in the Stringham and Ellis cases, supra, which this court held to not be a federal ground or decision. Even if the discussion of the venue question on second appeal could be held to be a decision of the merits of the venue

objection yet, as just shown, its decision on this venue question was based also upon the proposition that the first trial decision *had become the law of the case*—non-federal ground of decision.

> "This court will not review a state judgment, although a federal question was decided adversely to the plaintiff in error, if another question, not federal, was also raised and decided against him, the decision of which is sufficient to sustain the judgment."
>
> *Harrison* v. *Morton*, 171 U. S. 38.

> "Where the highest court of a state, in rendering judgment, decided a federal question, and also decides against the plaintiff in error upon an independent ground not involving a federal question, and broad enough to support the judgment, the writ of error will be dismissed without considering the federal question."
>
> *Rutland Co.* v. *Cent. Vt. R. Co.*, 159 U. S. 630.

> "A judgment of a state court based upon an estoppel on general principles of law and a statute of the state, irrespective of any federal question, as an independent ground broad enough to maintain its judgment, cannot be reviewed in this court on writ of error, although a federal question was also decided."
>
> *Gillis* v. *Stinchfield*, 159 U. S. 658.

Insofar as the venue question on first appeal was concerned the decision of the Supreme Court of Nebraska was based solely upon the ground that the question by not having been cross-appealed was waived (Rec. p. 213) this was a decision upon a non-federal ground. Even had the decision been upon a federal ground such decision would have been correct for, as held by this court in the recent case of *Peoria & Pekin R. Co.* v. *U. S.*, 68 L. Ed. Adv. Sheets, page 195, a failure to cross-appeal from claimed errors in the court's holding on objection to venue is a waiver of that objection (see *infra* pp. 20 and 21).

It therefore follows that the questions of whether Respondent was injured by Petitioner's negligence; whether he was engaged in interstate commerce within the meaning of the Federal Employer's Liability Act; whether he assumed the risk and Petitioner's venue objection were all questions which cannot be reviewed by this court. This is true for the reasons (1) that no review is asked of the first appeal and (2) insofar as the second appeal is concerned the decision was upon a question of general practice and in no manner involving a federal question.

But two other questions are presented by Petitioner, viz: (1) Substitution of parties defendant, and (2) a bare suggestion of error in an instruction.

The first of these is not open to dispute. The Winslow Act by its plain terms authorized such substitution.

The second is a suggestion. Petitioner does not argue it nor point out any claimed error therein. As a matter of fact the instruction was correct (Pet. Br. p. 7). It informed the jury of claimed acts of negligence on the part of Petitioner, all fully established by the evidence.

There is no color of merit in either of these questions.

The judgment of the Nebraska court should be affirmed without the necessity of considering Petitioner's argument as it is apparent this writ of certiorari presents no question that is not frivolous and wholly without merit, or fully foreclosed by prior decision of this court.

I.

PETITIONER CONTENDS THAT THE DISTRICT COURT OF DOUGLAS COUNTY WAS WITHOUT JURISDICTION OF HIS PERSON OR THE SUBJECT-MATTER BECAUSE OF DIRECTOR GENERAL'S ORDERS 50, 50-A, 18, 18-A, AND 18-B, PRO-

VIDING THAT ACTIONS BE BROUGHT IN THE DISTRICT OR COUNTY WHERE PLAINTIFF RESIDED WHEN INJURED OR WHEREIN INJURED.

RESPONDENT'S CONTENTION IN ANSWER THERETO IS THAT ALL RIGHTS GRANTED PETITIONER UNDER THESE ORDERS AMOUNTED MERELY TO A VENUE PRIVILEGE, WHICH PRIVILEGE WAS (a) WAIVABLE AND (b) IN THIS CASE WAIVED.

(a) THE VENUE PRIVILEGE WAS WAIVABLE.

Under the provisions of the Federal Employer's Liability Act, the District Court of Douglas County had jurisdiction of the subject-matter or "the class of cases to which this particular case belongs."

Actions for personal injuries brough under this federal act are transitory.

K. C. W. Ry. Co. v. *McAdow*, 60 L. Ed. 520.
Atchison, Topeka & S. F. v. *Sowers*, 53 L. Ed. 695-700.
Ches. O. & Del. R. Co. v. *Heath, Admr.*, 87 Ky. 651.
Gilman v. *Ill. C. R. Co.*, 137 Ky. 375.
Director General v. *Into*, 83 Fla. 377.

The Director General's orders did not attempt to limit the jurisdiction of courts over the subject-matter of such actions. The only provisions of the orders in this respect are that actions be brought in either the county or district wherein the injury occurred or wherein the plaintiff resided when injured. Provisions, such as these, have repeatedly been held to not affect jurisdiction over subject-matter—to confer a mere personal privilege for the benefit of the defendant, which he can waive. It is a privilege of venue only.

The latest holding of this court upon this subject is found in *Peoria & Pekin Railway Company* v. *United States*, 68 L.

Ed. Adv. Sheets 195, being an action brought in the Southern District of Illinois by the railroad company against the United States to enjoin enforcement of an emergency order of the Interstate Commerce Commission concerning switching. The Interstate Commerce Commission and another intervened. The Transportation Act of 1920 provided *that such actions be brought in the district of the residence of the party for whose benefit the action was begun.* In disposing of an objection interposed by the United States, that, because of this statutory provision, the court was without jurisdiction, this court said:

> "The United States contends, also, that the decree dismissing the bill should be affirmed, because, under the Act of October 22, 1913, * * * the proper venue was the district of Iowa, that being the residence of the Minneapolis &. St. Louis Railroad. * * *
>
> "The provision that suit shall be brought in the district of the residence of the party on whose petition the order was made is obviously one inserted for his benefit. If there were a lack of jurisdiction in the district court over the subject-matter, we should be obliged to take notice of the defect, even if not urged below by the appellee * * * (citations). But the challenge is merely of the jurisdiction of the court for the particular district. The objection is to the venue. See *Camp* v. *Cress,* 250 U. S. 308 * * * This privilege not to be sued elsewhere can be waived; and it was waived both by the Minneapolis & St. Louis Railroad and the Commission. The United States was, nevertheless, entitled to insist upon compliance with the venue provision; and its objection was properly taken below. But by failure to enter its objection, the right to insist upon it here was lost. The appellees can be heard before this court only in support of the decree which was rendered * * * (citations). We have, therefore, no occasion to consider whether the suit was brought in the proper district."

There is no difference in principal between this case and the case at bar which is authorized by the Transportation Act of 1918. The Director General's orders can in no sense

have a higher dignity than the statutory provision in the *Peoria & Pekin case,* and no stronger construction than being a part of the Transportation Act of 1918. If the venue provision of the Transportation Act of 1920 was waivable as held in the Peoria & Pekin case then the venue provision of the Transportation Act of 1918 must necessarily fall within the same rule and be waivable.

The rule has been applied and followed in actions brought under the Tucker Act whereby the United States consented to be sued for recovery of stamp taxes wrongfully collected, but *provided action should be brought in the County wherein plaintiff resided.* (*United States* v. *Hvoslef,* 237 U. S. 1, followed in *Thames & Mersey, etc. Co.* v. *United States,* 237 U. S. 19). In both cases this court held such provision as to district of suit to be "but a modal and formal one, which could be waived" and to have been waived in each case.

It is readily apparent that in principle the provisions of the Tucker Act in the two cases supra, is identical with the case at bar, wherein the Government consented to be sued for damages for personal injuries arising under federal control of railroads, but provided (through these orders) that such action be brought in certain districts. Both the Tucker Act and the Transportation Act of 1918 authorized actions against the United States; both provided the venue for such actions. The fact that one is for recovery of stamp taxes and the other damages for personal injuries is immaterial—the principle remains the same. The venue privilege of the Tucker Act being waivable, then the venue privilege involved in the case at bar must likewise be waivable.

Again, in an action brought against a national bank the provisions of Federal Act directing the action to be brought in a certain district was held waivable. *The First National Bank of Charlotte* v. *Morgan,* 33 L. Ed. 282. The same

principle involved in the case at bar is again found and again determined by this court to be waivable.

The rule has been applied repeatedly in connection with Sec. 51 of the Federal Judicial Code and kindred acts. Thus, in the recent case of *Lee* v. *Chesapeake & Ohio Ry. Co.*, 260 U. S. 653, an action for personal injuries, this court held that a plaintiff by bringing an action in a state court in a certain district waived the provision of Section 51 of the Federal Judicial Code, which provided that where jurisdiction is founded on diversity of citizenship, suit shall be brought only in the district of the residence of either plaintiff or defendant. The court said that such a statutory provision "does not limit the jurisdiction of the district courts, but merely confers a personal privilege on defendant, which he may assert or waive, at his election."

The following additional cases are along the same line as the cases immediately supra, viz:

Interior Construction Co. v. *Gibney*, 40 L. Ed. 401.
St. Louis v. *McBride*, 141 U. S. 127.
Western Loan & Sav. Co. v. *Butte, etc. Co.*, 210 U. S. 368.
Central Trust Co. v. *McGeorge*, 151 U. S. 129.
McCormick Har. Mach. Co. v. *Walthers*, 134 U. S. 41.
Texas etc. Co. v. *Cox*, 145 U. S. 593.
Ingersoll v. *Coram*, 211 U. S. 335.
In re Chicago, R. I. & P. Ry. Co., 65 L. Ed. 631 (Syl. 3 and 4).

In every instance the provisions of federal acts as to venue of actions—whether those of the Judicial Code, the Tucker Act, the National Bank Act (even for patent infringements) or the Transportation Act of 1920—have been always held to confer a mere personal privilege upon the defendant which can be asserted or waived. And, as held in the *Pekin and*

Peoria case, and the two cases under the Tucker Act, supra, the fact that the United States is party defendant does not alter the rule.

Director General of Railroads v. *Into,* 83 Fla. 377, involved the precise question presented in the case at bar. Action was against the Director General for damages for death of plaintiff's decedent. The Director General interposed the defense that the action could not be maintained where brought if the plaintiff was not a resident thereof, because of the provisions of these orders. The court held the orders to confer only a personal privilege for the Director General which could be waived and was in that case waived by entering a general appearance. The decision, of this court in *Alabama, etc. Co.* v. *Journey,* 66 L. Ed. 154, was noted and its holding that the orders were valid was followed.

Stanley v. *Schwalby,* 162 U. S. 255, and other cases cited by Petitioner at page 17 of his brief are not in point. The action of *Stanley* v. *Schwalby* was a plain suit of ejectment against the United States brought in state court. It was decided on general law that the United States is a sovereignty not subject to suit excepting where authorized by Congress. There was no authority ever given by Congress for such suits. Hence no officer of less authority than Congress could by waiver or any other manner authorize a suit against the government for eviction to lands claimed for a fort.

This is not authority here because under the Transportation Act of 1918 Congress gave authority to sue the Director General. The Director General had also been given authority to make rules within certain constitutional limitations and he made them.

If the Director General had the power to enact rules he had the power to waive them. This is fundamental, but the strongest reasons of all are that under the decision of the

Supreme Court of the United States, these rules of privilege may be waived by the Director General.

It is clear under these authorities that the venue provision of the orders could be waived. The next matter in order is to show that Petitioner did, in fact, waive the venue privilege in several instances.

(b) FACTS CONSTITUTING WAIVER.

That a clear understanding may be had of the facts for discussion of waiver of venue, a brief history of steps taken will be made:

Respondent was injured on September 13, 1919, and on February 9, 1920, filed his petition in the District Court of Douglas County, Nebraska. This petition was silent as to residence and county where accident occurred. February 12, 1920, summons was served. March 8, 1920, petitioner filed a "special appearance and motion to quash the summons" attacking jurisdiction of the court "over the person of the defendant *and over the subject-matter*" of the action, *because* of Director General's orders, alleging that Respondent was injured in Council Bluffs, Pottawattamie County, Iowa, and *resided there at the time of receiving his injury.* Under these pleadings, Petitioner had taken the affirmative of showing residence. No proof of any kind was offered on these claims, but they were abandoned and the court accordingly on March 13, 1920, overruled the objection.

April 2, 1920, Respondent filed an amended petition, which, like the original petition, was silent as to Respondent's residence and place where injured.

April 12, 1920, Petitioner filed his answer in which he alleged Respondent resided when injured and to have been injured in Council Bluffs, Iowa.

This was the last heard of the venue objection until December 16, 1921—a period of over twenty months. The cause had been submitted on briefs and arguments to the Nebraska Supreme Court and had been under consideration for six months before the venue objection was again heard of. Petitioner's general conduct suggested, and, from beginning to end shows uncontrovertable proof of an intention to waive. The one glaring fact which we will notice is that nowhere in the first trial did Petitioner ever claim the privilege of a different venue.

While we direct particular notice to the whole conduct of Petitioner showing constructive and intentional waiver from beginning to end—yet this one continuous waiver was made up of several independent acts of waiver, each of which gave the court jurisdiction of the person because any one waiver was enough. Once waived, forever waived. "A waiver of such objection must operate once for all."

Baker v. *Union St. Yards National Bank*, 63 Neb. 801.

Shutte v. *Thompson*, 21 L. Ed. 123-125.

This is why the Nebraska Supreme Court discussed at length only one waiver, though referring to and noting other acts of waiver.

A question waived in a state court will not be reviewed here.

Richmond Min. Co. v. *Rose*, 114 U. S. 576.
Tripp v. *Sant Rosa St. Ry. Co.*, 144 U. S. 126.

(1) Failure To Make Timely Objection.

The act of waiver which we wish to discuss first, occurred when plaintiff, the first witness, testified on cross examination that he was a resident of Pottawattamie County, Iowa, and was injured in said county. *Petitioner neglected to assert his privilege by then and there objecting to proceeding further,* because of want of jurisdiction over the person

(p. 10, addition to record). This testimony by the plaintiff and certificate of clerk (pp. 35 and 31, addition to Rec.), that all orders and objections are in the transcript and the whole transcript as certified, containing no such objection shows this waiver.

We reason that Petitioner, about the time the case was called, felt secure under the attitude of fairness of the state court; believed he could win upon the merits of the case, and desired to waive his privilege and have then and there in his favor a judgment upon the merits which would be *res adjudicata* and bar any later proceedings in Iowa. Petitioner's proper procedure is so much like waiver of right to remove by failure to immediately act on disclosure of facts during trial which justifying removal that this line of cases are authoritive on this point.

Fritzlan v. *Boatman's Bank*, 212 U. S. 364.

(2) By Motion To Dismiss.

Another act of independent waiver, or corroborative act of continuous waiver, occurred when plaintiff rested at the conclusion of his evidence upon the first trial.

Petitioner then moved for a judgment on the question of sufficiency of evidence on the merits of the case, and that alone. His motion to dismiss so limited, confirms Petitioner's policy of waiving and calling to his aid the power of the state court in a judgment that would protect him against future actions. This motion at page 13 of the addition to the record does not mention venue privilege or jurisdiction over the person, or what *was* proven as to residence and location on such a point. The motion follows:

> "The defendant now moves the court to dismiss the action for the reason that the plaintiff has *not* proved facts sufficient to *constitute a cause of action* in favor of the plaintiff and against the defendant under the pleadings and issues in this case."

This waiver cannot be disputed. The Petitioner or defendant in the first trial proceeded with the introduction of his evidence until both sides rested.

(3) By Second Motion to Dismiss.

Then another act of waiver, or continuing confirmation of previous waiver, occurred.

Petitioner, or defendant, having theretofore neither presented, nor maintained an objection, nor asserted his privilege, once more showed a disregard of such privilege by omitting from his motion any reference to lack of jurisdiction over the person *and confining his motion to direct a* verdict exclusively on grounds *going to the merits.* This motion (p. 19 of Add. Rec.) is as follows:

> "I wish to renew my motion made at the beginning of the trial. (Close of plaintiff's case above.) Comes now the defendant at the close of all the evidence and moves the court to dismiss this action for the reason that the evidence *fails to prove a cause of action* against the defendant and in favor of the plaintiff."

There is not a word about sufficient evidence being produced to show the wrong venue as a basis to claim privilege, or even an objection to venue, but only *failure* of evidence to *prove* the *cause of action.*

The certificate to this transcript that all motions and objections were included and the absence of any motions or objections therein relating to this question makes it perfectly clear that Petitioner never asserted the privilege not to be sued in Nebraska at the time such a privilege was made apparent to the court. On the contrary, Petitioner confined and limited his objections to the merits of the controversy or sufficiency of the evidence to constitute a cause of action.

But while Petitioner does not *directly* claim that he made such objection, or motion, he does indulge in equivocations in an apparent effort to induce a suggestion that such objections and motions were properly made. As an example thereof, at page 22 of his brief, he says:

> "* * * The statement (of the Supreme Court of Nebraska in its opinion) that no objection was made during the trial to the jurisdiction of the court is *misleading* and overlooks the fact that want of jurisdiction was alleged in the answer and proved by undisputed evidence. * * *"

By this statement Petitioner merely claims that the objection was alleged in his answer and that *later evidence was received* as to place of injury and residence in another state. He does not say *that after the evidence was adduced* he made any objection or motion. He never called the court's power to his aid when the case may have justified its exercise.

It may be Petitioner is not intending to equivocate, but is contending that it was sufficient that the objection be set up in the answer and proof be adduced in support of it—that calling the court's attention to the objection by motion or otherwise was not necessary. Such a proposition would be unsound, and wholly opposed to the well-settled practice in every jurisdiction. Petitioner, of course, had a right to insist upon his venue objection. And he had the right to waive it. When the proof was sufficient to sustain the objection then the privilege ought to have been called to the attention of the court and claimed. If he did not do so when the proper time arrived he waived. He remained silent then and thereafter. In so doing he was acting strictly within his rights. It was his business whether he wanted to insist on the objection or waive it. The trial court, even if it knew of the venue privilege had no duty to dismiss the action without Petitioner's request. Petitioner had the undeniable right to waive it, and to seek a decision in that court which would be *res adjudicata*.

Because of these conditions, a federal right in this respect was never denied. By failing to call the trial court's attention to the venue objection, Petitioner never gave the trial court an opportunity to deny, or grant a federal right.

Petitioner, on first trial, then and there got just exactly what he wanted and asked for—a dismissal of the action strictly *on its merits,* on the sole question of the sufficiency of the evidence to *constitute a cause of action* against the Director General.

> "* * * The contention of the government is inadmissible for the reason that it does not appear that the objection as to the district was raised below, and the decision of the district court * * * was invited upon the merits."
>
> *Thames S. Mersey M. Ins. Co.* v. *U. S.* 237 U. S. 19.

Petitioner was satisfied with that final adjudication which he accepted and swallowed with satisfaction; he then wanted no decision affecting the jurisdiction of the court over either the person or the subject-matter. He was then like the Merchant of Venice—"Oh, Righteous Judge!" He did not want that decision to be reversed or modified by either appeal or cross-appeal. He was for the decision and for the court.

(4) Failure To File Motion for New Trial.

We have another corroborative act of waiver in Petitioner's failure to file a motion for new trial after first trial.

The statutes provide for correction of errors in the trial court by motion for new trial. But the Supreme Court has modified the earlier understanding of this obligation, to exhaust that motion for new trial remedy before appealing, in holding that in equity cases and cases tried without a jury a motion for new trial is not necessary. This case does not fall within the exception for the reason it was a jury case. (The special appearance before trial was properly overruled

because no evidence was offered and no exceptions were taken.) After trial started, evidence of residence in Council Bluffs was received by admission of plaintiff and no objections to proceeding with the case were taken or rulings had for exception. If such a motion had been interposed, or asserted itself after trial begun and it was wrongfully overruled by some process of implication either known or unknown to practice, it would have been an *error during a jury* trial which would be waived unless saved by a motion for new trial. The failure to file a motion for a new trial to preserve objection in "special" appearance—had there been one—was fatal. There was no objection in fact as a basis for a motion for new trial on ruling upon venue. This failure, taken with the numerous other acts in this trial unmistakably shows Petitioner's intention to waive the privilege of venue and to fight the case in the state court on the merits. This is another reason why Petitioner did not cross-appeal. He had waived, or failed to lay the foundation for cross-appeal by failure to file a motion for new trial. He cut himself off from the right to cross-appeal by this waiver.

(5) Failure to Cross-Appeal.

Respondent filed a motion for new trial assigning as the sole error, the court's sustaining of Petitioner's motion to dismiss the action on the questions of sufficiency of evidence of negligence under Federal Employer's Liability Act and assumption of risk. This motion for a new trial was overruled, and Respondent perfected an appeal to the Supreme Court of Nebraska to reverse the ruling. Only one error was assigned, viz: Overruling Respondent's motion for a new trial.

Under Nebraska procedure, in fact, under the procedure in all jurisdictions, all rulings made in the trial court became final upon the dismissal of the action by the trial court and subject to review on appeal.

Petitioner had the right and duty to meet us at the threshold of the Supreme Court with a cross-appeal from any trial rulings—adverse to his substantial rights—which he saw fit to present. Such cross-appeal, however, was required to be perfected within four months after final determination of the action, viz: its dismissal in the trial court (see foot note, page 23, brief of Petitioner).

Apparently Petitioner was fully satisfied with all that had taken place in the trial court. He gave up his objection to rely upon the rulings of the state court. He took no cross-appeal. He continued in his abandonment of his venue privilege. He joined issue in the Supreme Court upon the sole error assigned by Respondent, and although allowable to cross-appeal, his "Propositions of law involved in the case and relied upon by the appellee" omitted all reference to the venue objection (Add. Rec. p. 24). The transcript presented to the Supreme Court of Nebraska *contained* only matters necessary to determine the negligence and assumption of risk issues, and omitted all reference to Petitioner's "special appearance and motion to quash" and the ruling had thereon. Petitioner, in stating the issues to the Supreme Court of Nebraska in his briefs, omitted all reference to the venue objection and even left out these features of his answer, indicating such portions he omitted by asterisks (Add. Rec. p. 22). In the brief that should have contained a cross-appeal (had he desired to make one) he, in stating the issues said—using bold type for emphasis (Add. Rec. p. 24):

> "This action is brought under the Federal Employer's Liability Act. *The sole question for determination is, whether the plaintiff proved facts sufficient to constitute a cause of action.*"

On November 18, 1921, some six months afterward a re-argument of the case was ordered for the following January before the Nebraska Supreme Court sitting in one group or division.

On December 16, 1921, Petitioner filed a "Supplemental Brief" (Add. Rec. p. 28) in which he sought to raise the venue objection. *THIS WAS THE FIRST HEARD OF THE VENUE OBJECTION, IN ANY COURT, SINCE IT WAS SET UP IN THE ANSWER FILED APRIL 12, 1920.* On December 23, 1921, Petitioner requested permission to file a supplemental transcript to include the original petition, summons and sheriff's return thereon, and the special appearance and motion to quash and the court's ruling thereon. These instruments had not been transcripted to the Supreme Court as not necessary to the determination of the ruling Respondent appealed from.

This was more in the nature of a belated attempt to *inject* the question into the record than to cross-appeal. It was an after-thought that *emphasizes the waivers* of Petitioner. Respondent filed objections to the filing of such proposed supplemental transcript or consideration of the venue objection with supporting brief. The matter was submitted to the court on the date of re-argument and the Supreme Court thereafter passed upon the question saying (Rec. p. 213):

> "Defendant filed a special appearance objecting to the jurisdiction of the court over the person of defendant and over the subject-matter of the action, and moved the court to quash the summons theretofore issued, on the ground that certain general orders of the Director General of Railroads set out as a part of the motion provided that suits against the Director General of Railroads, as authorized by General Order No. 50-A, should be brought in the county or district where the plaintiff resided at the time the cause of action arose. This objection was overruled. It was again urged in the answer, and, by brief filed out of time by leave of court, is sought to be urged now. But no cross-appeal from the ruling of the trial court was prosecuted by defendant, as required by the rules of this court, and appellee cannot be heard to urge this point now. (See subdivision *b*, Rule 18 of this court)."

This decision forever settled the venue objection insofar as this case was concerned. Under the law of Nebraska questions not cross-appealed are *finally closed* in the trial court; *Western Brick & Supply Co.* v. *Midwest Const. Co.*, 101 Neb. 254. Even if proper and sufficient objections had been interposed by Petitioner throughout the trial so as to save the point, his failure to cross-appeal would have constituted a waiver of the objection.

> *Peoria etc. R. Co.* v. *U. S.*, 68 L. Ed. (Adv. Sheets, p. 195).

Petitioner says (brief, Petioner, p. 22) that because his motion to dismiss was sustained there was no reason for him to complain further than that the court had no jurisdiction. That is just the question we are arguing. Petitioner, in the early proceedings of the first trial was satisfied with this jurisdiction—he was winning and waiving and did not care to object to the jurisdiction of the court. The court was giving him what he wanted. The court was killing Respondent's case forever. Therefore, Petitioner was invoking, and having the benefit of the power of this court. But when Respondent appealed from the orders and decisions against him the Director General did not want his objection to jurisdiction sustained. No other court could have given him more. That is why he did not attempt a cross-appeal. Besides all possible steps of that kind had already been waived directly or indirectly by not having been asserted as shown and consequently he was not denied this federal privilege because he did not opportunely claim it, as a basis for appeal, nor attempt a cross-appeal.

Upon page 23 of Petitioners' brief his counsel try to say there was no final order entered against appellee and consequently nothing upon which to cross-appeal *because defendant prevailed below.* But he prevailed against plaintiff *upon the merits and not on the question of lack of jurisdiction over the person. Petitioner lost on that question* and

stopped, satisfied that Respondent could not reverse the case upon the merits.

The resultant argument *of Petitioner* is that the judgment against the Director General *on venue was not final,* although the judgment against Respondent *on the merits was final.* But he is wrong. *Every interlocutory order from which appeal may not be immediately prosecuted becomes final and subject to review, unless waived, whenever the judgment is entered.* A final judgment makes all previous orders and steps thereby final so that every question and objection preserved may be reviewed on one appeal. While Petitioner could not have stopped proceedings to appeal from the overruling of his special appearance at that time, he could later; and at the proper time he could by cross-appeal have contested our right to review the merits of the case at the time we sought our appeal. (Could any reasonable lawyer believe that he wanted to cross-appeal?)

Upon the question of interlocutory orders becoming final by final decree see following cases:

State v. *Westorer,* 89 N. W. 1002.
Lewis v. *Barker,* 46 Neb. 662.
Gonzales v. *Duey,* 15 Ariz, 331.
Whitelaw v. *Ins. Co.,* 86 Kan. 826.
Walter v. *Staines,* 118 N. C. 842.
Wood, Carter & Co. v. *Mo. P. R. Co.,* 152 Cal. 344.
Levering v. *Webb Publ. Co.,* 108 Minn. 201.
Grunwalt v. *Grunwalt,* 24 Okla. 756.

These cases show the fallacy of counsel's complaint that they could not have preserved their objection by cross-appealing because the ruling was on an interlocutory order. This court has held *that it could have been done,* and when the Supreme Court of Nebraska held on the first appeal that it was not done, that decision became the law of the case.

Under the cases cited, there can be no question of this. The case at bar is identical with *McDowell* v. *Chesapeake, D. & S. R. Co.,* 14 S. W. 338, in which the Kentucky Supreme Court held (Syl.):

> "Where a special demurrer to a petition, raising the question of jurisdiction (venue), is overruled, and a general demurrer to the evidence is sustained, defendant cannot, after a reversal of the decision on the general demurrer, the question of jurisdiction (venue) not having been raised on the appeal, again raise the question of jurisdiction (venue) by answer."

We bracket "venue" after the word "jurisdiction" in the above citation for the reason that the question was one of venue—an action growing out of tort where defendant was summoned in a county other than that prescribed by statute.

Therefore, if Petitioner wished to rely upon his privilege and had properly preserved it without waiver, he should have presented the same to the Supreme Court and circumvented any other consideration of the case there. This failure was a waiver and no doubt not asserted because of being satisfied with this venue. It was never properly presented to the state Supreme Court. But suppose the Petitioner, or defendant, had wanted to cross-appeal after respondent had filed his appeal, what was his status?

Petitioner had offered no evidence on his special appearance and therefore would have had no foundation for predicating error on overruling the same. After this waiver no objection was ever made to jurisdiction over the person when the evidence was obtained by Respondent's admission and no objection was included in the motions, but the only two motions made to dismiss were predicated on *sufficiency of evidence.* These motions were waivers of venue privilege because of omission to assert a federal right, or this federal privilege, which the state court was given no opportunity to deny. *How could Petitioner,* or defendant, *have successfully maintained a cross-appeal* to the state court, much less

jump over one court and present it to the Supreme Court of the United States?

More than this he did not *attempt* to cross-appeal, which abandonment is a waiver, as held by the Supreme Court of Nebraska in this case (Rec. p. 214), and as held by this court in case of *Peoria, etc. R. Co.* v. *U. S.*, 68 L. Ed. (Adv. Sheets, p. 195).

(6) By Abandoning Special Appearance.

We may call attention to another fact showing waiver in the very beginning. While petitioner, upon the record *may have filed* an answer including claim of venue privilege, we find that instead he supplied the omission of place of residence from plaintiff's petition in his special appearance which thereby placed the pleadings *the same as if that fact was alleged in the petition* and thereupon charged defendant with such knowledge as he had assumed the burden of establishing. Therefore, his failure to present these facts or offer evidence upon this special appearance, after he voluntarily made it, should not be considered an oversight. That act of abandonment of this position in the light of the entire record and all following acts must be construed as an act of waiver—*waiving the offer of evidence, defendant,* or petitioner, had knowledge sufficient to allege in a motion to the pleadings.

After Petitioner, or defendant, waived the offer of his evidence the court on that account properly overruled his special appearance. No other conclusion may be drawn but that Petitioner waived his special appearance, after having admitted knowledge of these facts and having asserted the same.

"A party may waive any provision, either of a contract or of a statute, for his benefit * * * and if he does he cannot afterwards avail himself of them."
Shutte v. *Thompson,* 21 L. Ed. 123-125.

(7) By Direct Language in Brief.

The next waiver or confirmation of the original and continuing waiver is in the direct admissions of counsel for Petitioner before the court in his brief in the Supreme Court on first appeal (see pp. 44 and 45 hereof).

(8) Failure To Ask Rehearing.

Under Nebraska practice forty days are allowed after an opinion is filed by the Supreme Court before a mandate issue. This forty day period is to enable the parties to request a rehearing of any points believed to have been erroneously decided. Petitioner was evidently satisfied that none of his rights including the venue proposition had been denied him. No motion for rehearing was ever made, and, at the end of the forty days period, a mandate issued to the District Court of Douglas County, reversing the decision and ordering new trial.

On second trial and appeal, Petitioner reversed his first-trial attitude. He decided he wanted to stand upon the venue objection. The reason therefor was obvious. He lost before the Supreme Court *on sufficiency of the evidence.* Over two years had elapsed from the happening of the accident and any new action attempted to be prosecuted in any other jurisdiction would be barred under the statute of limitations. In fact, a new action was barred some four months at the time Petitioner sought to bring his objection *back to life* (if it ever had life) and inject it into the first appeal. Then a dismissal of the action on second trial on account of venue would be a final conclusion and simply beat a blind boy. Now, the only thing left for him was to forget estoppel and bear down on the venue proposition.

In case of *Shutte* v. *Thompson,* 21 L. Ed. 123-125, it was said:

> "If he refrained from making objections known to him, at a time when they might have been removed, and until after the possibility of such removal had ceased, he ought not to be permitted to raise the objections at all."

After the first appeal, Petitioner demonstrated quite clearly this new interest in and knowledge of how to advance the venue objection. He took the steps he should have taken on first trial excepting only the original error of uniting objection to jurisdiction over the person with objection to jurisdiction over the subject-matter as an inseparable statement thereby claiming too much power for a Director General order. (Petitioner could not, of course, rewrite his special appearance and answer.) On second trial, insofar as his venue objection was concerned, he: (a) objected to the impaneling of the jury (Rec. p. 38); (b) moved a dismissal on this specific ground at the close of Respondent's case in chief (Rec. p. 85); (c) made a like motion at the close of all the evidence (Rec. p. 190); (d) filed a motion for a new trial, alleging error, among others in the trial court having overruled his objections set out above, being careful to recite that even this was subject to his objection to venue.

Petitioner understands that he intended to and did waive the venue objection on first trial and appeal of this action and knows that the full records of the case so show. It was this knowledge that caused him to fail to incorporate the first trial and appeal proceeding in either the exhibit to his petition for writ of certiorari or the return to the writ. His actions confess a waiver, as much as fleeing sug-

gests guilt. He knew that this covering up would give him an advantage.

(9) By Joining Objections of Jurisdiction.

We next consider the first act of waiver discussed by the Supreme Court of Nebraska in its opinion. This waiver is the one occurring by reason of defendant having *joined an objection to the jurisdiction of the court over the subject matter with objection to jurisdiction over his person.*

Petitioner's argument from pages 8 to 26 of his brief is confined with a single exception, to discussion of this act of joinder constituting waiver. He seeks to lead this court into the belief that this is the only waiver involved. But, as hereinbefore shown, several waivers occurred.

The single exception of Petitioner discussing other acts of waiver occurs on page 22 of his brief whereat he sets out the following excerpt from the Nebraska Supreme Court's opinion on second appeal:

> "But no objection was made during the trial to the jurisdiction of the court, and the original special appearance and motion to quash the summons had been properly overruled, since there was no evidence to support it. No motion for a rehearing was made in this court after the filing of the former opinion in the case, and the former decision of the court has become the law of the case."

He says, concerning this, that he does not see how this statement tends to show jurisdiction. It is clear the court, in the above quoted short extract, said the following things, viz:

First. During the long procedure of trial no objection was made as to jurisdiction of person or venue;

Second. The original motion to quash the summons was properly disposed of by being overruled for want of evidence to support it;

Third. Not even a motion for rehearing was made to call up any question that had been overlooked;

Fourth. The former opinion was suffered to become the law of the case or accepted.

The position taken by counsel caused us to put a magnifying glass on the language of the court and bring out the four additional acts of waiver found by the court and confused by Petitioner. It clearly demonstrated other waivers were involved and noted besides the one of joining objection to jurisdiction over subject-matter and person.

PERRINE CASE CONSIDERED.

Perrine v. *Knight's Templar, etc. Co.*, 71 Neb. 267; 71 Neb. 273:

> "As said in *Western Indemnity Co.* v. *Rupp*, 235 U. S. 261, * * *:
>
> "'A non-resident party against whom a personal action is instituted in a state court without service of process upon him may, if he please, ignore the proceeding as wholly ineffective, and set up its invalidity if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. *Pennoyer* v. *Neff*, 95 U. S. 714, 732, 733; *York* v. *Texas*, 137 U. S. 15, 21. But if he desires to raise the question of the validity of the proceeding in the court in which it is instituted, so as to avoid even the semblance of a judgment against him, it is within the power of the state to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the merits, if the objection raised to its jurisdiction over his person shall be overruled.'" (Per Opinion on second appeal, Rec. p. 201.)

The Nebraska Supreme Court did not "arbitrarily refuse to give effect to the war order in question" (Br. Pet. p. 24); nor seek to evade it "by innovations in local practice appli-

cable to the case at bar and flatly at variance with its own previously well-settled rules" (Br. Pet. p. 26); nor did "the Supreme Court of Nebraska merely suspend the rules of practice, settled by its former decisions, and did not overrule them"—nor is the opinion "'special' and not 'general'" (Br. Pet. p. 24).

The requirement of Nebraska practice that persons who wish to appear "specially" to object to the court's jurisdiction over their person must stay out of court for all other purposes is established by a long line of cases of which the Perrine case is the keystone case (decided in 1904). It has never been overruled or modified, but to the contrary has been consistently followed as shown by the following cases (in most of which the Perrine syllabus upon this point was specifically quoted and adopted):

Brainard & Chamberlain v. *Butler, etc.*, 77 Neb. 515.
Summit Lbr. Co. v. *Cornell-Yale Co.*, 85 Neb. 468.
Lillie v. *Mod. Woodmen of Amer.*, 89 Neb. 1.
Clark v. *Banker's Acct. Ins. Co.*, 96 Neb. 381.
Rakow v. *Tate*, 93 Neb. 198.
Maxwell v. *Maxwell*, 106 Neb. 689.
State etc. v. *Westover*, 107 Neb. 184.
Legan v. *Smith*, 98 Neb. 7.
Mahr v. *Union Pacific R. Co.*, 140 Fed. 921.

In the Perrine case defendant invited an inquiry of the court on the question of whether or not the action was *transitory* thereby destroying the venue privilege or special appearance and resulting in a general appearance. In the case at bar we have the presentation of the identical question, viz: that Petitioner asked the court to hold that the Director General orders made the action local and not transitory which request waived the venue privilege and made it a general appearance.

Petitioner contends the Perrine case to be an authority in his favor. Let us analyze it:

The facts in the Perrine case were as follows: Perrine, a non-resident of Nebraska, instituted an action in Jefferson County, Nebraska, upon an insurance policy. As required by Nebraska statute, the defendant insurance company had executed a power of attorney constituting the auditor of Nebraska and his successors, its attorney in fact upon whom lawful process could be served. Service was had upon the auditor of Nebraska in Lancaster County. Thereupon the defendant appeared and filed the following instrument:

> "Comes now specially the above-named defendant, for the sole purpose of objecting to the jurisdiction of the court, and for no other purpose, and submits the court is without jurisdiction of the subject-matter or of the person of the defendant, for the following reasons:
>
> * * * * *
>
> "(5) That the defendant is a foreign co-operative and mutual insurance company, doing business in the state of Nebraska only by virtue of license issued to it by said state as such corporation, and neither the alleged cause of action, nor any part thereof, arose in Jefferson County, or in the state of Nebraska, and the plaintiff is not now, nor ever has been a resident or citizen of the state of Nebraska."

This special appearance was sustained by the trial court and the ruling appealed to the Supreme Court. On hearing the ruling was reversed (71 Neb. 267), for the reasons stated in second syllabus:

> "The appearance of a defendant, for the sole purpose of objection by motion to the jurisdiction of the court over his person, is not an appearance to the action; *but,* where the motion *also* challenges the jurisdiction of the court over the *subject-matter* of the controversy, *and is not well-founded, it is a voluntary appearance,* equivalent to a service of summons."

Later, a rehearing was granted and on such rehearing the Supreme Court adhered to its previous decision, saying (71 Neb. 273):

> "The 5th objection challenges the right of the plaintiff to bring and maintain the action in Jefferson county. This raises the legal question whether or not the alleged cause of action set forth in the petition was *local or transitory*. The challenge was made to the court by apt language in the formal part of the instrument and in the reasons assigned, and is a jurisdictional question, *not of the person*, but of the subject-matter of the action. *And, when followed by an exhaustive showing on this point, (as was done) of the truth of these allegations, we can come to but one conclusion, and that is, that it was the intention of the pleader to challenge the jurisdiction of the court over the subject-matter, and that he has done so both by his averments and by the evidence.*"

And Petitioner's conduct is squarely within the rule announced in the Perrine case. His so-called special appearance, like that in the Perrine case, objected to the court's jurisdiction of both subject-matter and person, and for the "assigned reason" that the action was not transitory under the Director General's orders which limited the court's jurisdiction over both subject-matter and person. Moreover, as in the Perrine case, we find Petitioner in his reply brief on second appeal (Add. Rec. p. 34) contending:

> "Under these orders of the Director General the defendant was privileged from suit upon the plaintiff's cause of action in *all* jurisdictions, *except* Pottawattamie County, Iowa. Actions against the Director General for personal injuries growing out of the federal control of railroads are not *transitory* but *are local* under the plain terms of the order."

And this contention regarding subject-matter was even carried into this court as shown by the following:

> "The question as to whether or not the cause of action was local or transitory was answered by the order

itself in plain language. *It was not transitory,* except *within the limits of the order.* The very purpose of the order was to *make what had theretofore been a transitory cause of action a local cause of action,* statutes and decisions to the contrary notwithstanding." (Petition for writ of Certiorari, p. 2).

"The question as to whether the court had jurisdiction does not depend upon whether or not the defendant appeared but upon the *validity of Order 18-B.*" (Petition for writ of certiorari, p. 11).

"The question as to whether or not the District Court of Douglas County had jurisdiction does not depend upon whether or not the special appearance and motion to quash constituted a general appearance under the rules of local practice; *but depends upon the validity of the orders. The District Court of Douglas County was without jurisdiction even though the defendant did file a general appearance, which we deny, by filing the motion to quash the summons* * * *" (Brief, p. 16).

This last excerpt is followed with further argument that the Director General's orders *made the action local.*

In the light of the excerpt quoted from Petitioner's reply brief filed on second appeal and the other matters referred to it is not necessary to show additional matters which led the Supreme Court of Nebraska to announce a finding that (Rec. p. 198) "it is strongly urged that the court had no jurisdiction of * * * the subject-matter of the action * * *." Above excerpts furnished sufficient grounds for the Nebraska Supreme Court's findings in this case to-wit:

"Defendant called for a determination as to whether the court had jurisdiction of the subject-matter of the action, which required an examination of the petition and a ruling as to the nature of the action. He thereby called for the exercise of a judicial function not relating to jurisdiction over his person. He must necessarily be before the court in order that this be done."

In view of the contents of Petitioner's answer (Rec. p. 16) and these contentions in both the Supreme Court of

Nebraska, and this court, of what value is Petitioner's red-faced assertion that the phrase "subject-matter" in his special appearance *was a mere slip of the pen?*

It is plain the point is controlled by the Perrine case.

The right of a state court to insist that a special appearance objecting to jurisdiction over the person be limited is well established, and the rule announced in the Perrine case has been of general application as shown by the following citation from Corpus Juris (Vol. 4, p. 1333):

> "Broadly stated, any action on the part of a defendant, except to object to the jurisdiction over his person which recognizes the case as in court, will constitute a general appearance. Thus a party makes a general appearance by objecting to the jurisdiction of the court over the subject-matter of the action, whether the objection is made by a motion or by formal pleading."

Citing U. S.:

Fitzgerald etc. Const. Co. v. *Fitzgerald,* 137 U. S. 98, 11 S. Ct. 36, 34 L. Ed. 608.

Mahr v. *Union Pac. R. Co.,* 140 Fed. 921, (Aff. 170 Fed. 699, 96 C. C. A. 19).

(Citing also Alaska, Minnesota, Nebraska, Ohio).

In addition to the Fitzergald case cited in Corpus Juris, supra, we find the rule to have been recognized in other cases decided by this court.

Western Loan & Savings Co. v. *Butte, etc. Co.,* 210 U. S. 368: Plaintiff, a citizen of Utah, brought action against defendant, a citizen of New York, in the Circuit Court of District of Montana, contrary to provision of code requiring action to be brought in district where defendant resided. The defendant filed a demurrer setting forth:

> "1st, that the court has no jurisdiction of the subject of the action; 2d., that the court has no jurisdiction of the person of the defendant; 3d., that said complaint does not state facts sufficient to constitute a cause

of action against this defendant; 4th, that the complaint is uncertain; 5th, that the complaint is unintelligible."

The court found that where "the suit is cognizable in some circuit court, the objection that there was not jurisdiction in a particular district may be waived by appearing and pleading to the merits." It held that the filing of the demurrer, *of and in itself*, was a waiver of the objection to jurisdiction of person. Relevant to a contention similar to Petitioner's (Br. Pet. p. 19) that the state practice denied him the right to assert this privilege, this court said:

> "So far from being obliged to raise the objection to the jurisdiction over its person by demurrer, as is contended by defendant in error, it was at liberty to follow the practice pursued in the code states under sections similar to section 1820 of the Montana Code, making a special appearance by motion aimed at the jurisdiction of the court over its person, or to quash the service of process undertaken to be made upon it in the district wherein it was not personally liable to suit under the act of Congress. This course was open to the defendant in the United States Circuit Court, as is shown by the case of *Shay* v. *Quincy Min. Co.*, (*Ex parte Shaw*), 145 U. S. 444."

Under Section 8610 of the Nebraska Code of Procedure (Br. Pet. p. 21) the right was specifically granted of so specially appearing, and recognized in the cases of *Templin* v. *Kinsey* and *Stelling* v. *Petticord, infra.* (p. 49) as well as in the case at bar, the Nebraska court said (2nd Opinion, Rec. p. 201):

> "If the defendant had only appeared specially to object to the court's jurisdiction over his person on account of the action not being brought in the proper county, and that he was not compelled to litigate the question in Douglas County, *the court would not have acquired jurisdiction over his persons* * * *."

The Nebraska court did not rule that the objection to person was waived because *of the orders, but because of it being claimed that they divested the court of jurisdiction of subject-matter.*

In *Thames & Mercy etc. Co.* v. *U. S.*, 237 U. S. 19, this court sustained a ruling by the lower court that a "special appearance" by demurrer which attacks other than the jurisdiction over the person was a general appearance to the merits, saying:

> (Syl.) "The requirement with respect to the proper district for suits upon claims against the United States, made by the Tucker Act of March 3, 1887, (24 Stat. at L. 506, Chap. 359 * * *) was waived where the United States, though asserting in its *demurrer to the petition that it appeared specially,* raised by that pleading not simply the question of jurisdiction, but also that of the merits, such a demurrer being in substance a general appearance to the merits. * * *
>
> "(24) *While the government asserted in its demurrer that it appeared specially, it raised by that pleading not simply the question of the jurisdiction of such a suit against the United States, but also that of the merits, seeking, and thus obtaining, a decision as to the constitutionality of the tax, and hence of the insufficiency of the facts alleged to support a recovery. Such a demurrer is in substance 'a general appearance to the merits,' and is a waiver of objection with respect to the district in which the suit was brought.* (Citations.)"

Again, in *St. Louis etc. Co.* v. *McBride*, 141 U. S. 127-131, it was held:

> "* * * Assume that it is true, as defendant alleges, that this is not a case in which jurisdiction is founded only on the fact that the controversy is between citizens of different states, but that it comes within the scope of that other clause, which provides that 'no civil suit shall be brought before either of said courts, against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant,' still the right to insist upon suit only in the one district is a personal privilege which he may waive, and he does waive it by pleading to the merits. In *Ex parte Schollenberger*, 96 U. S. 369, Chief Justice Waite said: 'The Act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of

a personal exemption in favor of a defendant, and it is one which he may waive.' * * *"

At this point let us consider the five cases Petitioner claims to have been overruled by the Supreme Court of Nebraska "without mention" in its decision upon the special appearance.

In *Baker* v. *Union Stock Yards Nat. Bank,* 63 Neb. 801, the plaintiff bank sued defendant Baker together with one Frazier; service was had by leaving a copy of summons at Frazier's usual place of residence in Douglas County, Nebraska. An alias summons was served upon Baker in Buffalo County, Nebraska. Baker answered to the merits which of course is a waiver. Thereafter Baker filed an amended answer in which he set up as a further defense that the court had acquired no jurisdiction because the service on Frazier was bad in that Frazier was a resident of Illinois at the time of purported service on him in Douglas County. (An attempt to avoid a waiver). The court held that the objection to venue could not be set up for the first time in an amended answer and held the objection had been waived by failure to insert it in the first answer. The question of a special appearance including an objection to jurisdiction of subject-matter with that of person was in no wise involved—in fact, no special appearance was ever filed in this case. The case is an authority, however, for Respondent's contention that privilege from suit in a certain county is waived by entry of a general appearance.

Templin v. *Kinsey,* 74 Neb. 614, and *Stelling* v. *Peddicord,* 78 Neb. 779, were both cases wherein a special appearance limited solely to the court's *jurisdiction over the person were concerned.* The court held in these cases that it was proper to *save* the objection in the answer. No question of waiver by incorporating an objection going to the subject-matter was concerned. These cases are nowise in point with the question decided in this case.

Hurlburt v. *Palmer*, 39 Neb. 158, involved the proposition contained in *Baker* v. *Union Stock Yards Nat. Bank, supra*. No special appearance was made in this case—either made or waived. The court merely held that objection to jurisdiction of person could properly be set up in the answer along with defenses to the merits where the objection did not show on the face of the petition as provided by Section 8612 of the Nebraska Code (set out on page 21, brief of Petitioner). The question of waiver by objecting to jurisdiction of subject-matter as well as person in a special appearance was in no wise involved or decided.

Kyd v. *Exchange Bank*, 56 Neb. 557, was another case where no special appearance and motion to quash was in any wise involved. None was ever filed in that case. The question was the right of defendant to object to jurisdiction over his person in his answer for the first time where defect was not disclosed on the face of the petition. The case is an authority in the group of *Hurlburt* v. *Palmer*, and *Baker* v. *Union Stock Yarks Nat. Bank, supra*, that an objection to jurisdiction of person can be properly raised for the first time by answer where the defect does not appear on the face of the petition—a contention which is in no wise concerned in the decision of this case by the Nebraska courts.

In three of these cases *no special appearance was even filed* or concerned and in two the special appearance *was limited exclusively* to objection *to jurisdiction of person*. Three are authorities only that the objection can be plead in the answer for the first time where the defect does not appear on the face of the petition as provided by Section 8612 of the Nebraska Code—and two that even where the defect does appear it is proper pleading to save the objection in the answer. *In none of them did the defendant attempt to come into court to question the court's jurisdiction over the subject-matter of the action before answer by special appearance or otherwise.*

All these cases involve rules clearly distinguishable from the Perrine rule—indeed have nothing to do with it.

(10) Privilege Never Claimed.

Petitioner never did assert the real privilege of waiver that the Director General orders gave. Whenever he spoke of jurisdiction over the person it was as a condition resulting from the asserted lack of jurisdiction or power of the court, taken away from all courts but those of two places. This position is shown by the arguments at pages 8, 9, 10 of his brief. Since Petitioner never objected to jurisdiction over the person in any different light than that and never did come right out and claim the privilege of venue as a privilege—that question was never before the court. Such a federal right was not asserted and not denied. Petitioner's counsel did not seem to recognize such a right to assert it. As stated above it will not do to say the court had *no power to act* and therefore *on that account* argue lack of jurisdiction in sweeping terms over *either* the subject-matter *or the person.*

The difficulty with Petitioner's argument on page 13 of brief is that the court held the appearance being general was more than "equivalent to the service of summons." That phrase was connected by a conjunction and followed by still stronger and broader language to-wit: *"and* gives the court jurisdiction over the person of such officer"—a general appearance and a waiver of venue privilege.

On page 12 of Petitioner's brief two excerpts of the Supreme Court of Nebraska are quoted and the assertion made that "it is apparent these statements are inconsistent." Let us see.

In the last of these statements the effect of joining an objection to jurisdiction of subject-matter with one to person is passed upon, and the filing of such an instrument held to

constitute a general appearance. This motion to quash is to be treated the same as a general demurrer or any other instrument would be. The inquiry was "What was its purpose? What did it question?" If it was broad enough to question subject-matter then it was a general appearance. In the determination of this question what disposition was made of the instrument on its merits is immaterial,—whether it was sustained, overruled or abandoned. The test is in the instrument itself. Its ultimate disposition is another question.

The finding that it was properly overruled because proof of its allegations was abandoned by Petitioner, does not in any way effect the question of whether its being *filed* constituted a general appearance. Such abandonment merely shows a waiver of the objections therein contained.

The excerpts quoted are not inconsistent, but to the contrary are entirely consistent.

The quotation shown on page 25 of Petitioner's brief is made up (as therein shown) of excerpts taken from three different pages of the second opinion of the Nebraska Supreme Court. These, Petitioner has adroitly assembled into one excerpt so as to omit all holdings of the court concerning the effect of the joinder of objection to jurisdiction of subject-matter with that of person. The result, he attempts to lead this court to, is that the Supreme Court of Nebraska never considered the words "subject-matter" as anything but mere surplusage. This is not the fact. The Supreme Court of Nebraska was asked by Petitioner to hold that the five orders of the Director General (set out as part of his motion, page 6, record) limited the jurisdiction of the District Court over the subject-matter of this action. After analyzing these orders, the Supreme Court of Nebraska found they did not limit the District Court's jurisdiction over subject-matter. But this was not a holding that Petitioner did not *question* and ask for a ruling that orders *did* limit jurisdic-

tion of "subject-matter." The court was analyzing Petitioners' objection that the jurisdiction over subject-matter was limited by these orders and found that it was not. The test in whether an appearance is special or general does not lie in the motion being sustainable, nor in the "reasons assigned" being good. The test is whether the objection to subject-matter *was made.*

WESCHLER CASE.

Petitioner, at this point on page 14 of his brief tried to use the case of *Davis* v. *Weschler,* 68 L. Ed. (Adv. Sheets) 5, in support of his very general appearance being distorted into a special appearance, but it does not do it.

The Weschler case is directly in line with us in reasoning. *It permitted the decision of the Court of Appeals to stand upon the question that General Order 18-A did not limit the jurisdiction of the court, but was only a question of venue which was waivable.* The court held that under the narrow facts stated the limited act claimed as a waiver was not sufficient in that case to constitute a waiver. Let us compare that case with the case at bar and see the distinction between that case, wherein there was no waiver, and this, with many waivers clearly made.

In that case the privilege of venue was plainly and seasonably made and at all times insisted upon. But in the case at bar, where the petition did not disclose grounds for such a privilege the Petitioner by special appearance supplied these alleged omissions and placed the pleadings in the position, so far as imparting knowledge, that this question could have been and was challenged by special appearance. However, petitioner, after a permissible and involved challenge, abandoned the same. This was a voluntary surrender. When the answer was filed, a pretended special appearance was filed to be united with defenses on the issue which could not be done because of the previous position taken and abandoned by petitioner.

Nevertheless, assuming for argument's sake, that this was a special appearance and was allowable, after this situation created by Petitioner and abandoned, it was too broad and contained an objection to the jurisdiction of the court over the subject-matter—an affirmative defense like a cross-petition. More than this, after evidence of residence of plaintiff, and place of injury, was admitted by Respondent, Petitioner waived his privilege by not then making a timely objection to jurisdiction over his person, but he proceeded with the trial, *never at any time* objecting to venue or moving a dismissal because of venue, all of which "plainly indicates that he intended (*not*) to adopt the position that the action was brought in the wrong county."

In the Weschler case counsel had a bare statement that a successor to the Director General "appeared" which was very properly construed to mean that he took the position of his predecessor. The objection in the Weschler case was timely and properly made and there was no clear and rational act of intended or constructive abandonment as there was in the case at bar. The language used "even if the order went only to the venue and not to the jurisdiction of the court" does not undertake to overrule a prior decision of this court or the court of appeals in that respect but rather concedes them by not overruling that part and shows the venue privilege is waivable and waived *if facts are sufficient to show waiver*. The language is equivalent to a statement that, "although the order went only to venue," etc., the *facts* were *not* sufficient.

In the Weschler case the issue presented was a clean claim of privilege under Order 18-A, timely asserted under Missouri law, the *validity* of which order was *denied* by the court. In the case at bar the Supreme Court of the State of Nebraska *upheld the validity of the order*, but further held the privilege of venue had been waived in several particulars.

In the Weschler case the act of substitution and appearance of the new agent was a "contemporaneous" appearance to re-assert a pure unabandoned claim of privilege. In the case at bar the first Director General waived absolutely and completely and sought a verdict on the merits alone that would bar a suit in any other jurisdiction.

In the case at bar any substitution was subject to the existing condition and no new substitution nor new trials could wipe out an old waiver of a former trial.

In the Weschler case the court held that when a federal right is asserted no state rule of practice will defeat the right. We purposely paraphrased this holding, by leaving out an important element to call attention to its importance. That phrase indicates that a federal right or privilege shall be "plainly and seasonably made," and we add for paraphrase *"and not abandoned,"* under the same reasoning. (In our case the *rule of waiver* applied was not one of local state practice on waiver, but it is one of general practice recognized by this court.)

We all have known that long before this case was appealed no rule of local practice will be tolerated to modify the substance of the Federal Act and nothing was ever done to circumscribe this *lapse*. The object of Petitioner is perfectly clear. His early successes lead him to think he could win this case on the merits and that he desired to stay and fight the case in the state court and not be confronted with another trial just across the bridge. Therefore, he did not *properly* assert any federal privilege and none was ever denied him. Therefore, this question is not reviewable.

> "• • • To become the basis of a proceeding in error from this court to the supreme court of a state 'a right, privilege, or immunity' claimed under a statute of the United States must be 'especially set up and claimed,' and must be denied by the state court. Rev. Stat. Sec. 709, Judicial Code, Sec. 237 (36 Stat. at L. 1156, Chap.

231, Comp. Stat. 1913, Sec. 1214). This means that the claim must be asserted at the proper time, and in the proper manner by pleading, motion, or other appropriate action under the state system of pleading and practice (*Mutual L. Ins. Co.* v. *McGrew*, 188 U. S. 291, 308, 47 L. Ed. 480, 484, 63 L. R. A. 33, 23 Sup. Ct. Rep. 375), and *upon the question whether or not such a claim has been so asserted the decision of the court is binding upon this court*, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right. *Central Vermont R. Co.* v. *White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; *John* v. *Paullin*, 231 U. S. 583, 58 L. Ed. 381, 34 Sup. Ct. Rep. 178; *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 46 L. Ed. 847, 22 Sup. Ct. Rep. 605; *Layton* v. *Missouri*, 187 U. S. 356, 47 L. Ed. 214, 23 Sup. Ct. 137.

"* * * While it is true that a substantive federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet the claim of the plaintiff in error to a federal right not having been asserted at a time and in a manner calling for the consideration of it by the state supreme court under its established system of practice and pleading, the refusal of the trial court and of the Supreme Court to admit the testimony tendered in support of such claim is not a denial of a federal right which * * * this court can review (*Baldwin* v. *Kansas*, 129 U. S. 52, 32 L. Ed. 640, 9 Sup. Ct. Rep. 193, *F. G. Oxley State Co.* v. *Butler County*, 166 U. S. 648, 41 L. Ed. 1149, 17 Sup. Ct. Rep. 709), and therefore, for want of jurisdiction, the writ of error is dismissed."

Atlantic C. L. R. Co. v. *Mims*, 242 U. S. 532, 535.

II.

PETITIONER NEXT CONTENDS ERROR IN SUBSTITUTION OF JAMES C. DAVIS, AGENT, ETC., AS DEFENDANT.

The only point made is that the Winslow Act was not curative of any action unless it was properly commenced.

The court having jurisdiction of the subject-matter as shown above and the action being transitory, defendant having only the privilege of objecting to venue, and having waived that, the action was properly commenced and pending because of Petitioner not having claimed such a privilege.

The foregoing should end the case and our brief ought naturally to stop at this point, because of the fact that the third (III) division of Petitioner's brief is limited to questions that have been foreclosed and mere trial questions. However, we proceed with a full answer to Petitioner's argument not knowing but that the court may desire Respondent's views upon same points raised by him. Considerable length is given by quoting opinions and extracts to save the time of the court, in turning to them elsewhere, yet so arranged that familiar opinions may be passed over.

III.

THE THIRD CLAIM PETITIONER MAKES IS THAT THE COURT ERRED IN HOLDING THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN A VERDICT.

Under this heading Petitioner discusses five elements, which we will consider as follows, viz:

A. NEGLIGENCE (pp. 59 to 100):

(a) Negligent acts considered (pp. 59 to 71);

(b) Petitioner's argument traversed (pp. 71 to 76).

B. PROXIMATE CAUSE (pp. 76 to 101):

(a) Petitioner's authorities considered (pp. 76 to 83);

(b) Unanticipated and unforeseen—Respondent's authorities (pp. 83 to 91);

(c) Respondent's argument on unforeseen doctrine (pp. 91 to 101).

C. ASSUMPTION OF RISK (pp. 101 to 107):

D. INTERSTATE COMMERCE (pp. 107 to 119):

(a) Gantry in—(pp. 107 to 114);

(b) Respondent in—(pp. 114 to 118);

(c) Question for jury (p. 119).

E. ERROR IN INSTRUCTION OF COURT.

As Petitioner barely mentions the claimed error in instruction and advances no reasons for his claim that it was erroneous, this assignment will not be further noted other than to say that the instruction complained of merely informed the jury of the claimed acts of negligence, all of which were sustained by evidence. See instruction No. 4, p. 25 Record).

The other questions will be treated in the order presented by Petitioner. These are trial questions arising under rules of general law and where federal statutes and privileges are not denied. Review of such questions are looked upon with disfavor by this court and the findings of the trial court are not usually disturbed.

This court has often held it is not a court of general review to decide issues of fact.

Louisville N. & R. Co. v. *Stewart,* 60 L. Ed. 989.
Seaboard A. L. R. Co. v. *Duvall,* 225 U. S. 477.

(Syl.) "Questions in a suit under the Federal Employer's Liability Act of April 22, 1908, (35 Stat. at L. 65, Chap. 149, Comp. Stat. 1913, Sec. 8658), which relate to matters of pleading, to the admissibility of evidence, to the sufficiency of exceptions, and to various rulings of the trial courts involving no construction of the federal statute, cannot be considered on a writ of error from the Federal Supreme Court to a state court.
* * *

(515) "Assignments 25 and 27 relate to the refusal of the court to permit testimony as to the delivery and contents of the 'clearance card' and the refusal to permit the railway company to show that, under the federal law, all engines, including 708, had been inspected and found to be in good condition. *They both raise questions of general law. They involve no construction of the federal statute,* and neither directly or indirectly affect

any federal right. Those assignments, therefore * * * will not be reviewed."

Central Vermont R. Co. v. *White*, 238 U. S. 507.

"* * * The case, then, is one in which there is no question as to the interpretation of any provision of the federal act, or as to the definition of legal principle in its application, *but simply involves an appreciation of all the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury. The state courts, trial and appellate, held that there were. Having regard to the appropriate exercise of the jurisdiction of this court, we should not disturb the decision upon a case of this sort unless error is palpable;* the present case is not of this exceptional character, and we confine ourselves to an announcement of our conclusion. Judgment affirmed."

Great Northern R. Co. v. *Knapp*, 60 L. Ed. 745-751.

See also

Seaboard Air Line Ry. Co. v. *Padgett*, 236 U. S. 668, 59 L. Ed| 777.

A. NEGLIGENCE:

(a) **Negligent acts considered.**

Respondent lost his eyesight through the explosion of a detonator (blasting cap) on a wire furnished him by his employers to use in the course of his employment. This wire was obtained by a fellow servant, who represented the employer. He found it in a coal car, and it was being used under the directions of the foreman when it exploded.

It is a positive duty of the master to furnish to his servants, for the performance of the work required of them, *safe and suitable materials*, such as a reasonably prudent person would ordinarily use under similar circumstances.

Texas & Pac. Ry. Co. v. *Archibald*, 42 L. Ed. 1188.

18 Ruling Case Law, Mast. & Serv, para. 210.

LeBatt, Mast. & Serv., 2nd. Ed. par. 917.

Union Pacific R. Co. v. *Snyder*, 38 L. Ed. 597.

This duty cannot be delegates to another so as to relieve the master from liability for injuries sustained by reason of a failure to perform it properly.

18 Ruling Case Law, Mast. & Svt. para. 210.
LeBatt, Mast. & Svt. p. 2396 (2nd. Ed.).
Union Pacific R. Co. v. *Snyder,* 38 L. Ed. 597, 601.
No. Pac. R. Co. v. *Herbert,* 29 L. Ed. 755.
Hough v. *Texas & Pac. R. Co.,* 25 L. Ed. 612.
Balt. & O. R. Co. v. *Baughn,* 37 L. Ed. 772, 781.

Where a master fails to furnish safe and suitable material and directs the employee to use certain material for a specific purpose, the master is liable for any injury caused by such material being defective.

Stanwick v. *Butler-Ryan Co.,* 93 Wis. 430.
Brown v. *Todd,* 46 App. Div. 546, 61 N. Y. Supp. 963.
La Bee v. *Sultan Logging Co.,* 47 Wash. 57.
Griffin v. *Boston & A. R. Co.,* 148 Mass. 143.
Cinn. I. St. L. & C. R. Co. v. *Roesch,* 126 Ind. 445.

The master, as a necessary corollary to the duties above recited, is charged with the positive duty of inspection. This duty is well stated in Ruling Case Law, Vol. 18, Master and Servant, par. 212, as follows:

"The duty devolving upon the employer to provide reasonably safe and efficient system for inspecting and testing the instrumentalities of his business is another of the absolute, non-delegable obligations that rest upon him. If he appoint another to perform this duty, the person appointed becomes his agent, and the knowledge of the agent is the knowledge of the principal. Accordingly, a foreman authorized to purchase, inspect and direct the use of lumber for the temporary structure of a bridge which his employer is engaged in constructing is held to represent the master in respect to the duty of inspecting to ascertain if the lumber used is reasonably suitable for the purpose intended, so as to

render the master liable for injuries to other employees due to failure to perform that duty."

See also:

Union Pacific R. Co. v. *Snyder,* 38 L. Ed. 597, 600.
Lafayette Bridge Co. v. *Olsen,* 108 Fed. 335.
Twombly v. *Consolidated Elect. Light Co.,* 98 Me. 353.
Crawford v. *N. Y. Cent. etc. R. Co.,* 163 N. Y. 391.
Missouri Pac. R. Co. v. *McElyea,* 71 Tex. 386.
International, etc. R. Co. v. *Kernan,* 78 Tex. 294.
Lincoln v. *Central Vermont R. Co.,* 82 Vt. 187.
Notes: 41 L. R. A. 109, 115, 117, 30 L. R. A. (N. S.) 50.

DUTY OF INSPECTION AND TEST CANNOT BE DELEGATED BY THE MASTER.

Thompson, on Negligence, par. 3791.
Chicago, B. & Q. R. Co. v. *Kellogg,* 54 Neb. 127.
Metropolitan Redwood Lbr. Co. v. *Davis,* 205 Fed. 487.
Ruling Case Law, Vol. 18, Mast. & Ser. par. 73.

EMPLOYEE MAY ASSUME MASTER HAS COMPLIED WITH HIS DUTY TO FURNISH SAFE MATERIAL PROPERLY INSPECTED.

18 R. C. L. Mas. & Ser. par. 91.
Balt. & O. R. Co. v. *Baughn,* 37 L. Ed. 772, 781.
Union Stock Yards Co. v. *Goodwin,* 57 Neb. 138 (Syl. 9).
Cinn. I. St. L. & C. R. R. v. *Roesch,* 126 Ind. 445.
Heinz 1. Knisley Bros., 185 Ill. App. 275

ACTUAL KNOWLEDGE BY MASTER OF DEFECT NOT NECESSARY.

26 Cyc. 1146.
Houston v. *Brush,* 29 Atl. 380.

WHERE MASTER FAILS TO INSPECT, CHARGED WITH NOTICE OF EVERY DEFECT AN INSPECTION WOULD HAVE REVEALED.

LeBatt, Mast. & Ser. par. 1059 (2d Ed.).
Libbey, McNeill & Libbey v. *Cook,* 222 Ill. 206.

NO DEFECT IS LATENT WHICH IS DISCOVERABLE BY EXERCISE OF DUE CARE.

Libby, McNeill & Libby v. *Cook*, 123 Ill. App. 574; affirmed in (1906) 222 Ill. 206.
Western Invest. Co. v. *McFarland*, 166 Fed. 76.
Feeney v. *York Mfg. Co.*, 189 Mass. 336.
Ferris Press Brick Co. v. *Thompson*, 124 S. W. 499.
Sack v. *Dolese*, 35 Ill. App. 636; affirmed (1891) 137 Ill. 129.

"A defendant cannot avoid its liability by shutting its eyes to its obligation to maintain a reasonably safe place."

Burnes v. *Kansas City, Ft. S. & M. R. Co.*, 129 Mo. 41, 31 S. W. 347.

"Inspection" means more than "looking"—the two words are not synonyms. And the authorities so hold. LeBatt, Master & Servant, (2nd. Ed.) par. 1063, states the rule as follows:

"Whether or not the duty of a master with regard to *proper inspection has been performed by the application of any given test is to be* determined by considering whether that *test* will give indication as to actual condition of the instrumentality in question. In the application of this principle the courts have usually proceeded upon the theory that a *mere visual or ocular inspection* of external conditions does not satisfy the full measure of a master's obligations, where the servant's safety depends upon the soundness of the material of which an instrument is composed." (Citing several cases under footnote 5.)

As defined in Words and Phrases (p. 1104):

"The 'inspection' required of an employee's place to work by his employer is *not necessarily limited to visual examination,* but is ordinarily *understood to embrace such tests and examination* as are *proper to determine fitness,* and *to include an inquiry into safety, efficiency*

and quality not resting on visual inspection alone." (Citing *Pettersen* v. *Rahtjen's Amer. Composition Co.*, 111 N. Y. Supp. 329, 332.)

Union Stock Yards Co. v. *Goodwin*, 57 Neb. 138, is a case wherein Goodwin, plaintiff, a brakeman for defendant, while attempting to set a brake on a string of six cars was injured by falling from the car caused by brake wheel coming off because the nut thereon was so large that it slipped over its threads, said:

"To *inspect* a car brake may *require more than a simple glance at it. Such a test must be applied as would probably reveal a defect* if one existed; and the *neglect* of a car inspector to make such a *test is evidence* of negligence."

In the case of *G. H. & S. A. R. So.* v. *Cora Lee, et al*, 27 Tex. Civ. App. 279, a case wherein a brakeman was killed by a fall caused by a defective stirrip, the nut on one end being missing, the court said:

"But the evidence does show that by looking or feeling under the car at the place where the nuts, which would securely hold the stirrup in position, were screwed on, the absence of the nut and insecurity of the stirrip could have been ascertained. This was not done. While this would have been practicable, the inspectors say it would have been inconvenient, and that they made such an inspection as was usual and customary, and as was made by other railroads under like circumstances. *The law will not balance human life against the inconvenience of an inspection reasonably necessary for its preservation*, nor excuse one company from the duty it enjoins because other companies may have been remiss in their duty. After all, whether a proper inspection was made was a question of fact for the jury."

In older decisions some courts excused a failure to inspect and test simple tools when purchased by the master from a reputable maker or dealer, where no circumstances, such as their passing through a fire, etc., had arisen. Most

courts and text writers, however, are breaking away from this exception as shown by the following authorities:

R. C. L. Vol. 18, Master and Servant, par. 75.
26 Cyc. p. 1140.

However, that old doctrine was never extended to a case where the so-called "simple tool" was purchased for a use other than that intended by the manufacturer or for which sold by a reputable dealer. To illustrate: Had Petitioner gone to a reputable dealer and purchased the wire found by Ed in the coal car as *binding wire* the fact that it was purchased from a reputable dealer would be no excuse. When he purchased the wire, the presence of the cap upon the wire would have been notice to him that it was more than binding wire and that it was not intended for use as such. If the reputable dealer could not inform him as to the identity and purpose of the cap upon the wire and he was unable to ascertain by inquiry, inspection or test as to its true properties—he would not be warranted in authorizing its use as binding wire—and the fact it had been purchased from a reputable dealer would be no excuse.

Where second hand materials are not obtained by the master from a reputable dealer but from questionable sources to which materials are appended, or contain other matters, the identity of which matters he has no knowledge of, the positive duty of inspection and test becomes more incumbent upon the master and is still more imperative as the place of its procurement becomes less and less "reputable."

Nickel v. *Columbia Paper Stock Co.*, 95 Mo. App. 226, where a rag and paper sorter was injured by poisonous material brought from a hospital, the court held:

> "We cannot see how defendant can construct any reasonable theory of escape from the wrong done the plaintiff. If the foul and poisonous material was collected by agents for whose acts it is responsible, then it should answer to plaintiff for the consequences. And if the

material was collected without defendant's knowledge or authority, then the jury has found that common prudence would have dictated an inspection thereof before handing it over to plaintiff for sorting. And if the business was such that such an injury as happened to plaintiff was likely to unavoidably follow, then it was defendant's duty to have warned the plaintiff of the danger, or to have taken precautions against such consequences."

It has been held (*Delaney* v. *Framingham Co.*, 202 Mass. 359) that where a second hand barrel has been procured by the master which he directed to be filled with hot tar and the only inspection made was by defendant's superintendent to discover whether there was any water in the barrel which might have injured the *tar;* that the explosion of the barrel because of its having been previously used for naptha rendered the master responsible for resulting injuries to an employee. The court held that an inquiry should have been made as to what the substance (naptha) contained in the barrel was and what its properties were when hot tar was poured upon it.

In *Gummerson* v. *Kansas City Bolt and Nut Co.*, (Mo.) 171 S. W. 959, plaintiff was injured while working in close proximity to a power hammer by a strong acid or lye flying into his eyes from the end of a piece of old, dirty and filthy pipe which was being flattened. The evidence showed the master to have procured second hand pipe from questionable sources containing questionable substances. This old pipe was first flattened by the power hammer, then cut into pieces and melted up and recast into the master's products. The pipe was not inspected and nobody knew what the substance in it was nor was any effort made to ascertain its identity or properties. The master was held negligent for failure to perform his positive, non-delegable duties and a verdict for plaintiff sustained. The situation in this case and the case at bar are similar.

In *Monarch Tobacco Co.* v. *Northern,* (Ky.) 124 S. W. 350, a second hand steam radiator had been purchased and upon steam being placed therein exploded. The master was held liable for failure to inspect it.

In *Vaughan* v. *Chicago Junction R. Co.,* 156 Ill. App. 364, it was held that the duty to inspect old, rusty and worn out parts placed in machinery is more urgent and necessary than required of new materials. Judgment affirmed in 249 Ill. 206, 94 N. E. 40.

In *Atlanta Coco Cola Bottling Co.* v. *Denneman,* 102 S. E. 542, the master was held liable for the defects and weaknesses in second hand bottles which were originally purchased by some bottling concern from persons unknown to defendant.

The negligence under this rule becomes more culpable when the external appearance of the material to be furnished to the employee is such as to put the master, or his vice-principals, upon inquiry.

LeBatt, Master and Servant, par. 1061 (2d. Ed.).

It is admitted in the answer that no inspection was made.

In the case of *Laurino* v. *Donovan, et al,* 173 N. Y. Supp. 619, a fellow employee (while cleaning master's premises) found one of these detonators with wire attached thereto in coal. He attempted to remove the detonator when it exploded, injuring plaintiff, a fellow workman. None of the workmen knew what the detonator was. *Held* that as it was found in employer's coal and might have been put in the furnace causing explosion and might have injured somebody, it was the fellow employee's duty to acquaint the employer with the fact of finding same and his failure to do so was negligence for which the employer was liable.

If the court in that case found it was negligence for the fellow employee not to show it to the master "*because it might be put in the furnace causing explosion and injure*

somebody"—what then will we say about the duty of Ed the vice-principal, when he *knew as a matter of fact that it was to be used as an instrumentality or piece of material in the due course of the employment of himself and his fellow workmen?*

It is true that above case arose under the New York Workmen's Compensation Law and that perhaps a finding of negligence was *obiter dictum*—but the fact remans that the court as a matter of fact did so find that it *was negligence* —at least giving us flatly to understand how they construed the fellow-servant's failure to properly act.

Applying these rules to the case at bar it is apparent that the master was guilty of culpable negligence. The master not only failed to comply with the positive duties of furnishing safe materials and to properly inspect and test such material but omitted and neglected to perform this duty under the specifice circumstances presenting themselves having regard for difference in ages and experience which made these failure gross negligence.

Ed recognized he did know what it was and that he was incompetent to inspect or test. That would not relieve the master, but shows that a boy would know less and relying on proper inspection by superiors and with no knowledge as to its place of procurement would go on using what was given him for use. Under such circumstances *it was then the duty of both Turner and Ed to discard the wire rather than to pass* it on to employees for use—rather than pass it to a boy who would naturally take it in a spirit of reliance. John, a mere boy, would not hesitate when a foreman and vice-principal accepted it. But as to the master, chargeable with a duty of overseeing, the cylinder being on the wire, created a specific circumstance putting him and his vice-principal upon inquiry. The rule under such circumstances is stated by LeBatt, Mas. and Ser., para. 1061 (2d Ed.):

> "Specific circumstances putting an employer upon inquiry as to the condition of instrumentalities—a. *External appearance of instrumentality.*—If any conditions visible upon a superficial examination indicate that there may be defects, only discoverable by a closer inspection, it is the duty of the employer to make such an inspection. This rule is sometimes applicable so as to charge him with negligence in failing to examine some particular part of an instrumentality, although the visible indications of danger were confined to other part."

In Ruling Case Law (Vol. 18, Mas. & Ser., (2d. Ed.) para. 73) the rule is announced, in the following language:

> "The employer is bound to have an inspection made wherever the discovery of the danger requires technical knowledge not possessed by the employee, or where the danger is concealed and the employee has no adequate knowledge to inspect for himself."

We respectfully urge the proposition that the defendant in furnishing this wire did not comply with the positive duty to furnish safe materials to his employees and we also contend that the employer absolutely failed to comply with the positive duty of inspection and test which was incumbent upon him.

The mere glance of Ed O'Hara and Turner was not an inspection. Brains and intelligence must go with the look. The master cannot say that because the foreign matter appended to the material is something that his "inspector" knew nothing about, he has fulfilled his duty of inspection. The result attempted to be obtained by inspection is to ascertain the fitness for use of the material for the purpose of rejecting the unfit. This cannot be accomplished unless the master inspects for action and not for mere optic exercises.

Were the rule otherwise, then all a master need do is to purchase wrecked tools, appliances and materials and place any incompetent cheap workman in charge of inspection

who would "bless" it all with a bath of human vision and responsibility would end. Suppose a barrel is needed for water and a call is made on the "inspector" for one. The "inspector" fishes one out—baptizes it with one ray of human sight, sees some unknown substance sticking to inside and gives the barrel to the gang. Responsibility is ended, because the seer saw. Water from this barrel poisons the men. Suit is brought and the "inspector" is produced by the defendant, takes the stand, and testifies he didn't know that the substance in the barrel was poisonous. Thereupon counsel for defendant moves for a directed verdict. Would the court sustain this motion? Would the court answer: "By 'inspector' we mean a man who is competent to inspect and test these things, and KNOWS whether they are fit for use or not. We will not permit human life to be jeopardized by the master's elevation of ignorance. If the defendant choses to select the materials for his workmen from questionable sources then the master shall not be heard in a court of justice to advance the explanation that he procured rubbish and furnished a man to "inspect" who was utterly incompetent to know and who in fact did not know and says he did not know what he was looking at—used it anyway—that because they did these things he shall be excused from liability." Would the court put the stamp of approval upon such a doctrine? Would the courts put a premium on ignorance? *The duty is absolute.* The master must furnish such material for the use of his employees as a reasonably prudent man would do under like circumstances. Whether or not he has complied with his duty and the correlated duty of inspection and test is a question of fact for the jury under the peculiar circumstances of each case. This court will not, as a matter of law, hold that the defendant is not liable in furnishing this wire, obtained from a coal car, and negligently "inspected" by one, and uninspected by another, of the only two superiors on the job. The court will not hold that they be permitted to furnish the same to this boy and exonerate the principal from all liability. When the defendant fur-

nished this wire to plaintiff without inspection and test, or by an ignorant unknowing glance, he rendered himself liable for all resulting injury occasioned thereby.

In view of the admissions and affirmative proof on neglecting to inspect and test the doctrine *res ipsa loquitur* is not necessary to urge in the sense of proving negligence already directly shown. However, the holdings of the courts where this doctrine is necessary to be resorted to are helpful in emphasizing the unrelenting insistance of the courts that the master perform these duties and that any failure so to do constitutes negligence. For this purpose we cite the *following* cases (a few of many) wherein the doctrine has been applied strictly where injuries have resulted from defective materials and the master's failure to show proper inspection and test:

Tyndall v. *N. Y. Cent. & H. R. R. Co.*, 141 N. Y. Supp. 879.

Ridge v. *Norfolk Sp. R. Co.*, 167 N. C. 510.

Atlantic Coco-Cola Bottling Co. v. *Denneman*, 102 S. E. 542.

Sullivan & Reed Foundry Co., 207 Mass. 280.

Wyldes v. *Patterson*, 31 N. D. 282.

El Paso Foundry & Mach. Co. v. *De Guereque*, 46 Civ. App. 86.

Metropolitan Redwood Lbr. Co. v. *Davis*, 205 Fed. 486.

Duran v. *Yellow Aster Min. & Mill. Co.*, 181 Pac. 395 (Cal.).

Wiles v. *Gt. No. R. Co.*, 125 Minn. 348.

St. Louis, I. M. & S. R. Co. v. *Holmes*, 88 Ark. 181.

Galveston, H. & S. A. R. Co. v. *Harris*, 48 Tex. Civ. App. 434.

Callahan v. *New England Tele. & Tel. Co.*, 216 Mass. 334.

Heinz v. *Knisley Bros.*, 185 Ill. App. 275.

Miller v. *Mo. & K. Tele. Co.*, 141 Mo. App. 462.

The Ocean S. S. Co. v. *Matthews*, 86 Ga. 418.
Houston v. *Bush*, 66 Vt. 331.
Martinkovics v. *Lehigh Coal & Nav. Co.*, 154 N. Y. Supp. 178.
Posey v. *Scoville*, 10 Fed. 140.

(b) Consideration of Petitioner's argument of negligence.

Petitioner, at page 31 of his brief, directs attention to the Iowa Workmens' Compensation Act (Rec. 16) and claims the Federal Employer's Liability Act is superseded by it, as alleged in his answer (Rec. p. 18). No assignment is made on this point; nor does Petitioner point out how this action is controlled or in any way influenced by the Iowa Act. It has often been held that such state compensation acts do not supersede, nullify nor even qualify the federal act, and any provisions thereof attempting so to do is unconstitutional and void.

Taylor v. *Taylor*, 232 U. S. 363.
Mich. Cent. R. R. Co. v. *Vreeland*, 227 U. S. 59.

Petitioner, on page 39 of his brief quotes a statement of Miss Gray, a stenographer, who produced a typewritten alleged statement of John O'Hara upon a contradictory statement on how the accident happened in which they had him tapping the cylinder to get powder out. John denied that he made those statements and the controversy was a jury question, not at all proper to be here. On cross examination we showed Miss Gray was an assistant to a legislative agent of the Union Pacific, that she had delivered her shorthand notes to the railroad company and also her typewritten sheets and that neither the notes, paper nor typewriter had been under her control since doing the work; we showed that Mr. Van Noy was an employee of this railroad and from the whole record the jury sustained Respondent upon this controverted question.

What was offered by Miss Gray is positively contradicted not only by Respondent, who described in his testimony exactly how the cylinder on the wire was tapped or struck in attempting to straighten the wire. It is also contrary to the evidence of defendant's witness Berg who said Respondent hit it with a hammer. Berg probably thought that was how it was from having seen a hammer used about that time. This contradicted both Respondent and Miss Gray—it was a controversial jury question—properly submitted to the jury.

Petitioner at page 41 of his brief quotes expert testimony (subject to acceptance or rejection by a jury) on how safe these caps were made and how seldom they explode accidently—but this was a jury question also on controverted evidence as there was an abundance of evidence that made it a controversy proper for the jury to determine. First, we have testimony it did explode and supporting evidence of extreme danger (see statement of case, p. 6).

At page 51 of his brief Petitioner again asks this court to decide a jury question. He goes further than asking a decision on disputed questions of fact. He goes to the extreme of asking this court to draw conclusions—based upon *no* evidence or even any reasonable inference or deduction therefrom. His argument would not be proper even to a jury because so utterly without support by the record.

He asks this court to say as a matter of law that the ten or twelve inches of wire (plus an undetermined crumpled amount) was too short for use in binding cloth on the one inch cable.

He then urges that this wire was neither directed to be or being used in the work. But the testimony is clear and uncontradicted that the foreman (as he admits) had directed its use and, further, that it was being so used. But one cloth had been bound on the cable at the time of the injury and Respondent was preparing this wire to be used in bind-

ing on the second cloth. It is clear that the wire was being used in the work and that the foreman had specifically ordered its use.

Continuing, Petitioner argues that there is nothing in the record to show that Ed knew or should have known that Respondent intended to straighten the wire or make use of it. The answer to this is, first, that it is immaterial what was going on in Ed's mind, and, second, if material, he had no reason to suppose Respondent would not use it, but to the contrary had every reason to know that Respondent would use it as John did—especially in view of the orders given by the foreman to conserve the wire.

Petitioner then argues that Ed *intended* to throw the remaining wire away after cutting off the second portion because Ed "had no further use for it." This is down-right deception. Petitioner several times inquired as to Ed's unexpressed mental intentions but the trial court properly ruled such inquiry immaterial and as not communicated to the Respondent—not binding on him. In the first place Ed never testified that he intended to throw the wire away; in the second place he never verbally expressed such an intention to Respondent or any one else; in the third place his conduct clearly indicated a contrary intention. Having cut the second piece off, Ed carried both that piece and the portion given Respondent some 20 feet to where Respondent was working and there gave him the wire. This conduct would not indicate to a third party an intention to discard it—but it was rather an indication to the contrary that he intended it should be preserved. The process involved in this argument of Petitioners' is that he seeks to first establish an intention (with no basis therefor) in the mind of Ed; having established (?) that intention to charge Respondent with a knowledge of it, even though all actions indicated quite the converse, he would build up his theory of idle curiosity. Everything that was said and done indicated

clearly that the foreman's orders to conserve the wire still stood and were being explicitly followed. That is why Respondent continued on in the duty of preparing it for use. But these are all jury questions.

From these false premises Petitioner argues that Respondent was a mere volunteer. In a further attempt to establish the "volunteer" theory Petitioner urges that *had* the wire been thrown away by Ed, Petitioner "would have understood from *that fact* that his uncle was discarding it, that it was unfit for use." But again, it is seen the argument is based upon premises that never existed—Ed did not throw the wire away—so any conjecture as to what *might* have been the situation *had* Respondent picked up *discarded* wire is wholly immaterial and irrelevant. This case was not tried or decided on *assumed* situations, but upon the situation actually present. Whether Respondent would be called upon to have interpreted an act of throwing it away as being Ed's opinion that it was "unsafe for use," or too short for use or what not, is entirely foreign to the record. If such an act would have suggested its unsafety, Respondent did not *even* have the benefit of that suggestion.

The statement that plaintiff had been standing idly by —just waiting— and had done nothing to aid in the work until he received this wire is unsupported by the record. As a matter of law it is immaterial whether he had or not. As a matter of fact the statement is not true. The record specifically shows that Respondent had assisted in getting and cutting the cable and that he, as well as all members of the crew were busy performing this duty at which all five men were engaged.

Petition seeks to make a point in the claim that Respondent "asked for" the cap. Again, as a matter of law it is immaterial whether he did or not, but as a matter of the record there is no basis for such statement. Nobody testified he

asked for it or that he was asked to take it. The testimony is that the cap was handed to him and he took it as anyone would under such circumstances.

The record clearly discloses that plaintiff was injured while acting within the scope and course of his employment by the actionable—yes, culpable—negligence of Petitioner and his agents.

He undertook a task knowing he had no sufficient materials on hand, and instead of procuring materials from a reliable source he elected to order the gang to find it. This wire was procured from an empty coal car—it was mere rubbish. Appended to it was an article of sufficient suspicion that had it been procured from a reputable dealer the master would have been placed upon notice to investigate as to its identity. The foreman, standing in the shoes of the master, passed it for use with a mere glance; the servant who procured it (also standing in the master's shoes) likewise passed it without inspection. It was supplied to Respondent as a suitable material for the specifically directed use. Respondent not knowing where it was procured or that it was uninspected, but believing, as he had a lawful right to do, that it was safe and reasonably proper for the use furnished, was injured by its exploding. It is hard to conceive of a situation where an inspection and test and inquiry are more urgent than in cases like the case at bar, where rubbish, gathered from a suspicious place and having suspicious elements is procured by the master. If under these circumstances the master was not bound to inquiry and inspection and test—or to the alternative duty of discarding the material instead of passing it for use—then these rules are meaningless. With the master's admitted knowledge of these circumstances, and his admitted lack of inspection, and his admitted furnishing and ordering its use, the Petitioner became guilty—as a matter of law—of culpable negligence. There was no question of fact for the jury—the

master admitted the circumstances—and the jury could not have otherwise found but that the positive duties were violated.

The facts are the instruction leaving this question to the jury was more favorable than Petitioner was entitled to have under the law. But since the question went to the jury and they found against him the cases on page 43 of his brief are not in point, because they all apply to cases where there was no evidence of negligence.

B. PROX|MATE CAUSE:

(a) Petitioner's authorities considered.

Pages 44 to 50 of his brief are devoted to a contention that the evidence does not show that the injury sued for was proximately attributable to the acts and omissions relied upon by the plaintiff. In support of his contention he cites several cases from an analysis of which it is clearly shown that all but two have no application to the case at bar:

The first case cited, *St. Louis & S. F. R. Co.* v. *Conarty*, 238 U. S. 243 (Br. Pet. p. 44), in which plaintiff, switchman, *standing on the running board* of engine was injured by coming in contact with the *sill of a car*. It appeared that this car had no drawbar or automatic coupler and that had it been so equipped the sill of the car would not have come in contact with plaintiff. "The only negligence charged in the complaint was a failure to have the car equipped, at the end struck by the engine, with an automatic coupler and drawbar of standard height as required by the safety appliance acts, and there was no attempt to prove any other negligence." This court disposed of the case on the ground that the safety appliance act was not enacted for the benefit of any persons other than those coupling and uncoupling cars—and that plaintiff, who was neither coupling or uncoupling this car and having no intention so to do was not one of the persons for whose benefit the law was enacted.

Lang v. *N. Y. Cent. R. R. Co.,* 255 U. S. 455 (Br. Pet. p. 45), involved the identical question presented in the Conarty case, under similar facts, and the Conarty case was specifically adopted and followed.

Neither of these cases announce any rule applicable to the case at bar, as Respondent was one of the class of persons for whose benefit the courts have required the master to perform the positive, non delegable duties involved in the case at bar.

Prior v. *Williams,* 254 U. S. 43 (Br. Pet. p. 45), was a case concerning only assumption of risk. We have digested this case at page 101 infra.

State v. *Ellison,* 196 S. W. 1088, (Br. Pet. p. 46): Plaintiff, an engine foreman, was injured while attempting to signal an engineer on another track to stop. The sole negligence involved was the failure of this engineer to pay attention for signals causing plaintiff to step on another parallel track to better attract his attention. In so doing he stepped in front of another engine on the parallel track and was injured, without fault of those operating the engine striking him. The sole question involved the failure of the first engineer to pay attention for signals. It was held that no recovery under such circumstances could be had as the first engineer's negligence was not the proximate cause of the injury by the second locomotive on the other track. This was a case of an efficient intervening cause, even if the first engineer was negligent.

Great Northern Ry. Co. v. *Wiles,* 240 U. S. 444 (Br. Pet. p. 47). In this case the injury was caused by the plaintiff's own negligent failure to perform his positive duty of protecting the rear of the severed train. He knew a passenger train was close behind and neglected to get out and flag it. The passenger train crew was not negligent. He lost his life because he, himself, neglected to do the very thing he was hired to do to save life.

Milwaukee, etc. Ry. Co. v. *Kellogg,* 94 U. S. 469 (Br. Pet. p. 47) is, as shown at page 97 hereof, an authority in favor of Respondent.

McGill v. *Mich S. S. Co.,* 144 Fed. 788 (Br. Pet. p. 47): An appeal was prosecuted from a decision against recovery for an explosion occasioned by drilling in an oil tank in a gas-filled space above the oil—a lighted candle being used by the driller. Everybody knew the oil would not flash, but few knew the gas given off would explode if mixed in a certain proportion with air. (We eliminate holding on steamship limitation and third party liability). The lower court held against plaintiff. The appellate court reversed the case: that court holding that the plaintiff drilling knew the gross fact that there was oil in the bottom of the tank and space above, but that he could not be charged with scientfic knowledge that that space was filled with an explosive combination and the employee could not, therefore, be charged with negligence or assumption of risk in lighting his work with a candle; that, on the other hand (applying the principles in the Kellogg case) the officers of the steamship company ought to have foreseen more than the servant and that probably an explosion of gas might occur from the work of the employees; that the superintending engineer was its officer to inspect the work; that he ought to have foreseen that an accident was likely to occur; that the injury was the natural and probable consequence of his act. The case is clearly an authority in favor of Respondent.

Western Union Tel. Co. v. *Hall,* 287 Fed. 297 (Br. Pet. p. 47) is not in point. This was a suit in which recovery was sought for mental anguish for failure to deliver a telegram. It went off on the rule of law in federal courts that no recovery would be allowed for mental anguish even though accompanied by pecuniary loss, quoting the parts of Kellogg case, which case as shown (page 97 hereof) is an authority for our contention.

Bryant v. *Beebe-Runyan Co.,* 78 Neb. 155 (Br. Pet. p. 47). The proximate cause, as found by the court, was clearly the negligence of plaintiff who voluntarily and knowingly placed himself in a position of danger between two other trucks and operated his truck at such speed and so close to his fellow workmen's trucks that he ought to have expected injury in the event a truck was stopped quickly for any cause. Plaintiff was injured by reason of his own affirmative negligence. This case merely illustrates that the rule works both ways—that a *plaintiff* as well as a *defendant* may expect injuries to follow negligent acts.

Kitchen v. *Carter,* 47 Neb. 776 (Br. Pet. p. 48) excuses the master in event the injury is caused where *"some new efficient cause intervenes* not set in motion by him and not connected with but independent of his acts." There was no intervening cause in the case at bar, or none claimed. Respondent's injury followed directly from an explosive being attached to wire furnished him to use as binding wire—and from the master's failure to perform his positive, non-delegable duties of furnishing safe material and inspection and test.

Williams v. *Hines,* 189 N. W. 623, (Br. Pet. p. 47) follows the efficient intervening cause rule in *Kitchen* v. *Carter.* An employee suffered a broken collar bone by negligence of employer on February 19, 1918; on April 5, he was discharged from the hospital; on September 2nd he resumed his employment as brakeman and worked until October 4th, when he was suddenly taken ill with bronchial pneumonia and died October 13th. All physicians agreed the kind of pneumonia from which deceased died was a *germ* disease and not traumatic pneumonia which develops within a few hours from effects of injuries. "An injury, in order to be the proximate cause, must be the thing that directly causes the subsequent disease, and not merely a condition enabling it to operate independently." The evidence failed to show death caused by injury or in any manner traceable to it.

Merkouras v. *C. B. & Q.*, 101 Neb. 717 (Br. Pet. p. 47). (opinion by divided court): Plaintiff and a fellow workman were laying up track for twenty minutes wrestling. They were directly in line with the approach of cars they knew were to be moved. Plaintiff's foot was injured by being run over when these cars were advanced. It was held the railroad company owed plaintiff no duty to anticipate such wanton negligence on the part of plaintiff; nor such improper use of the tracks—that the tracks of and in themselves constituted a sufficient warning. There was *no* negligence on the part of the defendant—the closest negligence alleged being failure to observe a rule which a divided court held was inapplicable to the situation presented.

New Orleans v. *Harris*, 247 U. S. 367 (Br. Pet. p. 48): Plaintiff sought a recovery based solely on a state law providing that, in actions against railroads for damages, proof of injury inflicted by an engine propelled by steam shall be prima facie evidence of negligence. Accordingly plaintiff introduced no evidence of negligence, but proceeded upon the theory announced in the state statute that it was rather for the defendant to show no negligence. This court held the statute to be inoperative insofar as actions brought under the Federal Employer's Liability Act are concerned, and that the burden of proof was upon the plaintiff. No evidence of negligence having been introduced and the statute being inoperative, the judgment rendered in favor of plaintiff was reversed and remanded for further proceedings not inconsistent with the opinion. The case is an authority only that negligence must be proved by plaintiff—a proposition conceded by us and in nowise involved in this action where there was an abundance of affirmative proof as well as admitted negligence.

Nitro-glycerine Case, 15 Wall. 524 (Br. Pet. p. 48) is way off the mark. That action was not under the strict law of Congress making one liable for defect or insufficiency of

material, or any negligence of agents and servants, but concerned a mere licensee upon premises. Well-Fargo Company was a carrier—a package was given it for transportation, nothing unusual about its presence. No law required them to obtain information on contents or to inspect and test the package or its contents. It came in usual course of business. Oily contents were leaking and the company was attempting to open the package to fix it for forwarding. It exploded. Defendants repaired the premises of the landlord from whom they rented, but it was held they were not liable to other tenants of the building. Of course, nothing was said of the liability of the shipper, but as to the carrier there was no act of negligence shown. At every step it was doing its duty and no negligent act was in evidence. This co-tenant action—this sort of landlord and tenant case—cannot be worked into an authority in the case at bar to show that there was no negligence of agents and servants, or insufficiency or defect in materials and appliances under this great act of humanity passed by Congress.

Cleghorn v. *Thompson*, 62 Kan. 727 (Br. Pet. p. 49) was overruled by the Kansas court in 187 Pac. 661. Insofar as the citations from Thompson and Pollack are concerned they are not in point with this case. In the case at bar the accident did not occur while Petitioner was "proceeding in a lawful business, exercising reasonable care," but from his direct negligence. Nor can the consequences be "ascribed * * * to an act of God," but they are directly chargeable to Petitioner and his "*not* exercising reasonably care" or, indeed, any care at all.

Southern Pacific Co. v. *Berkshire*, 254 U. S. 415 (Br. Pet. p. 50) announces the rule that the master *is not an insurer.* Petitioner merely seeks to emphasize this rule. We do not dispute the rule.

We fail to see how any or all of these cases even tend to establish the proposition Petitioner cites them as supporting, viz: "the evidence does not show that the injury sued for was proximately attributable to the acts and omissions relied upon by the plaintiff." There is certainly no applicability to the case at bar of the rule announced in *Southern Pacific Co.* v. *Berkshire, supra,* that a master is not an insurer; nor the rule in the overruled case of *Cleghorn* v. *Thompson* that a master while exercising reasonable care is not liable, because, in the case at bar, the master was not so proceeding. Nor the rule in *Kitchen* v. *Carter, Williams* v. *Hines* and *State* v. *Ellison,* to the effect that where an efficient cause intervenes which, self-operating, causes the injury, the master will be excused does not apply, as no cause—efficient or otherwise—intervened in the case at bar. Nor the rule in the *Conarty* and *Lang* cases where plaintiff was not one of the persons protected by the safety appliance acts because in this case Respondent was one of the persons to be protected by the master's performance of his positive duties. Nor the rule in *Great Northern* v. *Wiles, Bryant* v. *Beebe-Runyan* and *Merkouras* v. *C. B. & Q.,* that where the injuries occur through the plaintiff's own negligence the master is not responsible. Nor the rule in *New Orleans* v. *Harris,* that proof of negligence is an affirmative proposition to be established by plaintiff under the Federal Employer's Liability Act and that a state statute creating a prima facie case is inoperative in actions brought thereunder. There was no statute involved in the case at bar by which we sought to establish negligence, but to the contrary the proof of negligence was in the violation of the common-law positive duties incumbent upon the master. Certainly the co-tenant law in the Nitro-glycerine case has no applicability to the case at bar—especially so when in this case we have shown culpable negligence.

The only authorities Petitioner cites which are pertinent to the case at bar are the two upon the anticipation and

unforeseen doctrines—the case of *McGill* v. *Mich. S. S. Co.*, and *Milwaukee etc. Ry. Co.* v. *Kellogg*,—and, both these cases are authorities that Respondent ought to recover, rather than that he ought not. That no confusion result we will fully discuss these two doctrines (unforeseen and unanticipated), and will cite the principles and authorities which are controlling upon this phase of proximate cause.

(b) UNANTICIPATED AND UNFORESEEN.

The accident and resulting injuries to respondent flowed in an unbroken chain directly and without efficient intervening cause from petitioner's negligence. Therefore, such negligence constituted the proximate cause of the accident.

Petitioner at pages 44 to 50 of his brief, contends the accident was not proximately attributable to his negligence for the reason claimed that he could not anticipate nor foresee the results.

"The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."

Per *Milwaukee etc. Co.* v. *Kellogg*, 24 L. Ed. 256, 259 (followed extensively as shown by over eight pages of Roses notes including several cases involving breach of master's duties similar to case at bar.)

Chicago etc. R. Co. v. *Moore*, 36 Okla. 450.
Konig v. *Nevada etc. Co.* 36 Nev. 181-210.
Young v. *New Jersey etc. Co.*, 46 Fed. 162.
Swain v. *C. R. I. & P. Co.*, 174 N. W. 384.
Schumaker v. *St. Paul & D. R. Co.*, 46 Minn. 39.
Fort Worth etc. Co. v. *Cobell*, 161 S. W. 1083.
Bishop v. *Victor Chem. Wks.*, 209 Ill. App. 220.
Collins v. *Pecos & N. T. Ry. Co.*, 212 S. W. 477.
Schabow v. *Wisconsin Traction Co.*, 155 N. W. 951.

According to some authorities the unforeseen doctrine has no application in a case where there is no intervening efficient cause.

> "This rule is also said to be no test in cases where no intervening efficient cause is found between the original wrongful act and the injurious consequences complained of, and in which such consequences, although not probable, have actually flowed in unbroken sequence from the original wrongful act." Ruling Case Law, Vol. 22, p. 121.
>
> *Gilson* v. *Dela. & Hudson Canal Co.*, 65 Vt. 213.

Others that the rule is used only to extend liability in cases of wilful or malicious acts.

> "Proximate consequences are regarded, in case of mere negligence, as covering only such direct and immediate results as occur without the intervention of any outside or independent agency, while in case of wilful or malicious acts, consequences which might have been reasonably expected or foreseen are deemed to be proximate, though outside and independent agencies do intervene." (Note, 45 L. R. A. 87).

All authorities are agreed upon the following principles: All consequences which naturally ensue without intervention of some independent agency are deemed foreseen.

> "* * * Thus it is laid down in many cases and by leading text writers that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable sequence of the negligence or the wrongful act, and that it was such as might, or ought to, have been foreseen in the light of the attending circumstances. This results from the principle that one who is guilty of negligence is deemed to have foreseen, and is liable for, all consequences which may naturally ensue therefrom, without the intervention of some other independent agency, although in advance, the actual result might have been improbable. * * *." (Vol. 22, R. C. L. 119).

Negligence having been established the doctrine is never applied to the consequence.

"It is not necessary to a defendant's liability, after his negligence has been established, to show, in addition thereto, that the consequences of his negligence could have been foreseen by him; it is sufficient that the injuries are the natural, though not the necessary and inevitable, result of the negligent fault, such injuries as are likely, in ordinary circumstances, to ensue from the act or omission in question. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could have foreseen the particular results which did follow. * * * The result seems to be that, when the act complained of was such that, in view of all the circumstances, it might not improbably cause damage of some kind the doer of the act cannot shelter himself under the defense that the actual consequence was one which rarely follows from that particular act. To hold so would be to say that a plaintiff must show similar injuries to have occurred in the same manner before he could recover. And it would lead to the anomalous result that for the first, and perhaps the second, injury occurring in such manner there could be no recovery; but for the third, or when the circumstances ceased to be peculiar or became familiar the defendant would be liable. * * *" (Vol. 22, R. C. L. 125; *Tex. & Pac. R. Co.* v. *Carlin,* 111 F. 777.

In case of *Evansville Hoop & Stave Co.* v. *Bailey,* 84 N. E. 549, the court held:

"A person is liable for injuries resulting from his negligent act, if they are the natural, though not inevitable result thereof, or such injuries as are not ordinarily likely to ensue therefrom, though he may not have been able to foresee them.

"It is not required in order to fix defendant's liability *after his negligence has been established and resulting injuries to the plaintiff to show in addition thereto that the consequences of his negligence could have been foreseen by him.* It is sufficient that it be

shown that the injuries are the natural, though not the inevitable, result of defendant's negligent fault; such injuries as in ordinary circumstances are liable to ensue from the act or omission charged. * * *"

In *Washington & Georgetown R. R. Co. etc.* v. *Hickey*, 41 L. Ed. 1101, the driver of a street car attempted to cross a railroad track in front of a rapidly approaching train which was so near that the least delay in crossing would probably lead to an accident. The gateman lowered the crossing gates so as to pen the car on the track. It was held that the two negligent acts of the two companies constituted a single cause of concurring negligence and the proximate cause of the accident; that insofar as the driver of the street car was concerned it was enough that he should have anticipated that *any* delay of *any* kind from *any* one of a hundred different causes would result in an accident and that it was not necessary that the driver should foresee the very thing itself which did cause the delay—"the material thing for him to foresee was the possibility of a delay from any cause, and this he ought naturally to think of, and a failure to do so, and an attempt to cross the tracks, might be found by the jury to be negligence, even though he would have succeeded in getting across safely on the particular occcasion if it had not been for the action of the gate-keeper in wrongfully lowering the gates. The act of the driver being a negligent act and that act being in full force and in the very process of execution at the time the accident occurred, which accident would not have happened but for such negligent acts the fact that another negligent act of a third party contributed to the happening of the accident would not absolve the horsecar company."

The particular accident which occurred need not be foreseen—it is sufficient that any accident might have and should have been anticipated.

Pennell v. *Rumley Pro. Co.*, 159 Wis. 195.
Helen v. *Supply Ldry Co.*, 163 Pac. 9.
Branegan, etc. v. *Town of Verona*, 174 N. W. 468.
Barabe v. *Duhrkap Oven Co.*, (Mass.) 121 N. E. 415.
Ogden v. *Aspinwall*, 220 Mass. 100.
Doyle v. *Chicago, St. P. & K. C. R. Co.*, 77 Ia. 607.
Cinn. etc. R. Co. v. *Padgett*, 158 Ky. 301.
Mitchell v. *Schofield's Sons & Co.*, 16 Ga. App. 686.
Mast v. *Borneman & Sons Co.*, 111 N. E. 949.
King v. *Inland Steel Co.*, 96 N. E. 337.
Regan v. *Cummings*, 117 N. E. 800 (Mass.).
Hudson v. *Seaboard, etc. R. Co.*, (N. C.) 97 S. E. 388.
Memphis Com. Gas & El. Co. v. *Creighton, et al*, 183 Fed. 552.
Coel v. *Green Bay T. Co.*, 147 Wis. 229.

Where negligence caused injury the results will be held to have been foreseen.

Benton v. *St. Louis*, 248 Mo. 98.
Gulf & S. Fe. R. Co. v. *Smith*, 148 S. W. 820.
Collins v. *Pecos & N. T. R. Co.*, 212 S. W. 477.
Vicksburg S. & P. Ry. Co. v. *Jackson*, 133 S. W. 925.
Woodson v. *Met. St. Ry. Co.*, 224 Mo. 685.
Washburn v. *Laclede Gas Co.*, 214 S. W. 410.
Furkovitch v. *Bingham Coal Co.*, 45 Utah 89.
Hill v. *Winsor*, 118 Mass. 251.
Washburn v. *Laclede Gaslight Co.*, 223 S. W. 725.
Illinois Car etc. v. *Brown*, (Ind.) 116 N. E. 4.
Greer v. *St. Louis etc. R. Co.*, (Mo.) 158 S. W. 740.
Bunting v. *Hogsett*, 139 Pa. St. 363.
Cleveland etc. R. Co. v. *Clark*, (Ind.) 97 N. E. 822.
Irby Lbr. Co. v. *Bratcher*, (Tex.) 191 S. W. 700.
El Paso S. W. R. Co. v. *Barrett*, 101 S. W. 1025.
Galveston etc. R. Co. v. *Cook*, (Tex.) 214 S. W. 539.

The particular results need not have been anticipated.

A. T. & S. F. R. Co. v. *Parry,* 67 Kan. 515.
Ill. Cent. R. Co. v. *Silor,* 229 Ill. 390.
Gulf etc. R. Co. v. *Gentry,* (Tex.) 197 S. W. 482.
Seckinger v. *Mfg. Co.,* 129 Mo. 591, 603.
Houston Chron. Pub. Co. v. *Lemmon,* (Tex.) 193 S. W. 347.
Dixon v. *Schott,* 181 Ill. 116.
White v. *Sharpe,* 219 Mass. 383.
Chicago Veneer Co. v. *Jones,* (Ky.) 135 S. W. 430.
Ft. Worth Belt R. Co. v. *Cobell,* 161 S. W. 1083 (Tex.).
LeBeau v. *Minn. etc. R. Co.,* 164 Wis. 30.
Norfolk etc. R. Co. v. *Whitehurst,* (Va.) 99 S. E. 568.
L. & N. R. Co. v. *Wright,* (Ky.) 210 S. W. 184.
Phillips v. *St. L. & S. F. R. Co.,* 211 Mo. 419.
Christianson v. *Chicago, St. P. & O. R. Co.,* 67 Minn. 94.
Pulaski Gas Light Co. v. *McClintock,* 97 Ark. 576.
Isham v. *Dow,* 70 Vt. 588, 591.
Wash., Alex. & Mt. V. R. Co. v. *Luken,* 32 App. D. C. 442.
Mesa City v. *Lesueur,* (Ariz.) 190 Pac. 573.
Watt v. *Evans etc. R. Co.,* 129 N. E. 315.

The fact that an unusual accident occurs is no defense.

Munsey v. *Webb,* 59 L. Ed. 162.
Texas & Pac. R. Co. v. *Carlin,* 111 Fed. 777 (affi. 47 L. Ed. 849).
Dean v. *Railroad,* 199 Mo. 386.
Jackson v. *Miss. Tel. Co.,* 26 L. R. A. 102.
El Paso & N. W. Ry. Co. v. *McComas,* 36 Tex. Civ. App. 170.
Gellar v. *Briscoe Mfg. Co.,* 136 Mich. 330.
Ft. Worth v. *Patterson,* 196 S. W. 251.

Lilly v. *N. Y. C. & H. R. R. Co.*, 107 N. Y. 566.
Reed v. *Mo. K. & T. Ry. Co.*, 94 Mo. App. 371, 381.
Doyle v. *Chicago, St. P. & K. C. R. Co.*, 77 Ia. 607.
White Sew. Mach. Co. v. *Ritcher*, 2 Ind. App. 331.

Texas & Pacific R. Co. v. *Carlin, supra*, was an action by a servant against the railroad company for injuries sustained by being struck by a maul which the foreman negligently left on the track so that it was struck by a train and thrown 20 feet against plaintiff. Defendant relied upon the unforeseen and unanticipated doctrine. The Circuit Court of Appeals held:

"It must be conceded that the injury for which the action is brought occurred in an extraordinary and unusual manner. *Just such an occurrence was not to be anticipated.* The defendant requested the trial judge to instruct the jury that, although they may find that the foreman failed to discover the maul, 'yet, if you believe from the evidence that the result which followed from his failure to discover it was not such result as ought to have been foreseen in the light of the attending circumstances, then, in such event, the failure of the foreman to discover the proximity of the hammer would not be such negligence as would make the defendant liable, and you must find for the defendant.' The court did not err in refusing to adopt this view of the case. It may be true that the accident in *its extraordinary form, with its peculiar circumstances,* could not have been expected to happen from the maul being left on the bridge near the rail, yet the act of permitting it to remain there was none the less negligent, for it threatened danger in many directions. It was liable to produce familiar results, which would cause serious injury. The fact that it happened to cause the injury in a manner so unusual that it was not to be expected cannot prevent the act from being negligent when it was likely to cause injury in a way that might be foreseen. It may be true that the negligence in this case produced an effect not before observed, the circumstances of which could not have been anticipated. But, if it was negligence likely to produce other and familiar injuries, the peculiarity of the acci-

dent does not prevent liability. (*Doyle* v. *Chicago, St. P. & K. C. R. Co.*, 77 Iowa 607, 4 L. R. A. 420, 42 N. W. 555). The extraordinary circumstances attending the injury cannot serve as a defense. To so hold would be to say that a plaintiff must show similar injuries to have occurred in the same manner before he could recover. And it would lead to the anomalous result that for the first, and perhaps the second, injury occurring in such manner there could be no recovery; but for the third, or when the circumstances ceased to be peculiar or became familiar, the defendant would be liable. * * *"

In *Munsey* v. *Webb, supra,* the court held that while it was not to be anticipated *specifically* that a man from internal causes, would drop into an open door of an elevator and receive injuries as it passed upward; that there was a possibility and danger that in some way some one in the elevator would get some part of his person outside of the car when in motion and that such a circumstance was obvious; that omission to close the door constituted negligence which "very properly could be found to have been the proximate cause of the death." It was noted that the negligence was merely a passive omission of duty to close the elevator door, but this omission was deemed sufficient under the rule in the Kellogg case (94 U. S. 469).

Cincinnati N. O. & T. P. Ry. Co. v. *Padgett,* 158 Ky. 301, is a case where a railroad company allowed a stick of dynamite to remain in a pitch bucket, where covered with pitch; the act of negligence was held the proximate cause of injury from an explosion later, occurring when one of the men used it as a receptacle for burning rags to drive off mosquitos. The court also held the railroad company could not escape liability because it could not foresee the bucket would be used to burn rags—it could appreciate that some kind of accident might occur with this dangerous material.

Northrup v. *Eakes,* 178 Pac. 266, was a case where several lessees of oil lands negligently permitted crude oil to escape

into creek where it became ignited by some stranger, extending to and burning property close to the stream. It was held the acts of exhausting crude oil in the stream was the proximate cause of the damage, even though a stranger ignited it, the rule announces a man is liable for his negligence in very clear language, then says:

> "Tried by this test, it appears to us that the act of defendant in negligently discharging crude oil, a highly inflammable substance, into the stream above plaintiff's barn was the proximate cause of the injury, for the reason that the injury done by the floating oil ought to have been foreseen, in the light of all surrounding circumstances. *The defendants cannot be heard to say that they did not know the crude oil was inflamable, or that they had no reasons to believe that crude oil, which they negligently allowed to flow into the creek, would become ignited and be driven by the winds and the natural flow of the stream upon plaintiff's premises. The question is not whether such an act would produce a conflagration in the majority of cases, but whether it has a decided and natural tendency to produce such a result.*"

The court, in the case above, cited *The Santa Rita,* 176 F. 890, 100 C. C. A. 360, where it was held, the discharge by a steamship of fuel oil into the water, which floated under the wharf and matted with inflamable rubbish was the proximate cause of burning another vessel, although the oil was ignited by an independent innocent act of a stranger throwing a lighted cigar into the water.

(c.) ARGUMENT ON UNFORESEEN DOCTRINE:

We have exhaustively examined cases on this question and will give the court their essence boiled down, and in our language

The outstanding point is that one established by this court in the Kellogg case (94 U. S. 469) as follows:

> "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is

not a question of science or of legal knowledge. It is to be determined as a fact in view of the circumstances of fact attending it."

No real lawyer ever claimed any right to recover unless the injury resulted from some wrongdoing, which is ordinarily negligence.

Negligence always involves an element of culpability. Without that something it is not negligence. No one is negligent who obeys the law and who is careful to avoid the probability of any injury to his fellow men. If one, using such care, while moving about, and indirectly injures another without intention, and without carelessness, but purely unavoidable, in the face of every reasonable care, such injury is called a pure accident. It is not actionable. One pursuing his duties in a lawful and careful manner is not chargeable with foresight to any such extent as one who is negligent, because law and duty has chosen the less dangerous path and injury is not probable in such a course.

The other extreme or contention is the one our adversaries take, proclaiming he shall not be liable unless the injury is the result of a particular knowledge that the injury happening would happen. That theory embraces the criminal, who, of course, is punished for such conduct. This, however, is not a wrong of neglect or negligence, but it is an intentional wrong. (He is, of course, liable for civil damages for intentional wrongs, as well as punishment, but we are discussing negligence.)

Between these extremes of criminal responsibility and innocence there lays a field of civil liability—negligence—sounding in tort. All who do not foresee any *definite particular injury* to any one in particular but who carelessly, or thoughtlessly, act violative of law or duty, conscious—or accountably conscious—that some injury of some kind may, on that account, happen to somebody, are liable for any and all of the injuries that directly flow from the misconduct.

This field of negligence may be separated into two natural divisions, viz:

First. Negligence of those who while violating statutes, ordinances, positive duties or inhibitions of common law and because of the act of violation, injure others, are liable, civilly, to the persons injured. It is for neglect of law—neglect of duty and is compensatory.

Second. Negligence due to failure to do what a reasonable and prudent person would ordinarily have done under the circumstances, or of doing what such a person under such circumstances would not have done.

(1) Under the first class of negligence (injury to private individuals because of neglecting to obey laws or positive duties) *proof of one of the elements essential in the other class is not inherent. It is never necessary to prove anticipation of injury, or that that injury, or any injury, was foreseen.* This is because it is immaterial whether the person actually guilty of negligence anticipated or not. The lawmakers did the foreseeing and anticipating for him. In other words, they took away that element in certain cases. The fact that there *was* danger, *is the reason* for the law, or duty. Therefore, the individual, in a sense, is presumed to have foreseen, as he will not be allowed to defend on the ground that he *did not* foresee. Proof under this class of cases ordinarily requires but two elements, (a) breach of law, (b) damages or injury resulting from the breach.

(2) Now as to the second division of negligence (or failure to do or not do what a reasonable person would under the same circumstances) we have a sort of self-adjusting automatic system of law-making set up in the mind of every man. He must know his duty, under the circumstances confronting him. It is shifting. He is liable for damages to his fellow man for neglect of that duty. This duty primarily must be determined by the man called upon to act. He must

impose these rules upon himself and obey as a reasonable man would do.

In this class of cases, where there is no violation of law or positive duty, and a man is pursuing his usual vocation, and his conduct, as a circumstance of an injury, is subject to inquiry for civil liability, three things are essential to prove viz: (a) *a duty or obligation* must be proved—*or anticipation* which presents the duty. (This duty takes the place of a law we are presumed to obey in the first class.) (b) A breach of that duty or obligation, and (c) the injury or damages suffered.

In this second class of cases, where a man *is not* violating *positive duties or laws,* but is *pursuing rightful occupations* or pleasures we cannot make him guilty of negligence, no matter how bad the injury, *unless we prove he neglected to do or refrain from doing as the ordinarily careful and prudent man would have done under the same circumstances.* In order to prove this *in rightful pursuits* you are bound to show *that injury should have been anticipated or foreseen. Not particular injury to the particular person as it happened,* but you must show that the circumstances were such that the ordinarily prudent man would know the act *would probably injure someone in some manner.* It is just a process or way of reasoning out whether or not a person enjoying his own rights was careless or reckless of the rights of others. The anticipation, or foreseeing, and neglecting to be governed *by this knowledge of danger* is the self-created law upon which you are held to accountability. You cannot escape it by saying you yourself did not see it—because the standard is, whether a reasonable person under those circumstances could have seen it and therefore whether you should have seen it. And you cannot say you did not know that kind of an injury could result, because in the same way the answer is: you should have anticipated that some injury was liable to occur to some person.

So that to be guilty of negligence in this class of cases it must be shown that *there was the element of foreseeing*—that he *could anticipate danger and neglected to be cautious in such a situation or in view of this knowledge.* Let us illustrate:

A man racing on a training track upon his private enclosed ground is not violating any law, obligation, or duty, and hence not guilty of any negligence. But the same man seeing a child toddling alone close to the track *by his foresight* and disregard of same may become guilty of negligence from this element. *His foresight alone and the circumstance is the basis for negligence.* Again, if so driving *and having no knowledge* of a child being in the vicinity, who suddenly steps out, under these circumstances the *unforeseen element saves him from negligence.*

Because such a large number of cases involving the element of anticipation or being unforeseen, has caused many superficial students of the question to believe that that element—anticipation—*was an inherent part of every case and of every element of a case of negligence.* They supposed in *every* case the particular injury had to be foreseen. In the same way they supposed even the extent of the injury had to be foreseen.

This element of anticipation *only goes to the extent,* or is used for *the purpose of determining,* whether a *man is careless or negligent.* That is all that is meant by being unforeseen. It is just another way of reasoning whether a man was negligent or not. Whenever the unforeseen argument is used the "unforeseen" must be so used as to determine whether the act was a dangerous act, or so disassociated with culpability as to have made a case *entirely of no negligence and no breach of duty.* That is why "unforeseen" is no defense in neglect of law-obedience, positive duties, rules of employment *or negligence per se.*

When in the second class of cases (where men are violating no law or duty but nevertheless cause an injury) anticipation is necessary to be proven and his neglect to act as a prudent man is shown.

From this testing formula, whether named as an unforeseeable doctrine—or lack of anticipation—having been used only to ascertain if negligence existed, has caused the unthoughtful to think the element of being "unforeseeable" must exist in every case, whether or not negligence could be established independent of the foreseeable result. Accordingly the ultra defender and fighter of all liability for any negligence, so urges, and he even contends that to be liable he has in every case to foresee not only an accident as probably resulting from his conduct, but in addition thereto the specific accident, the manner of its happening, the injuries resulting, and the extent of those injuries even contending where an unusual result ensued he should be excused. They are like the old doctors who discovered the medicinal properties of calomel and quinine in a few cases and gave it in all—the bleeders bled, and the vaccinators vaccinated—as the appendix experts cut the bowels out of men, so do these lawyers overwork the sane and sensible use of the element of foreseeness. Because it has been used to *establish negligence in some cases*, they say foreseeness must be shown in *every* case, or if not shown, there is no liability.

The courts, however, have refused to follow these contentions and have uniformly held that the unforeseen doctrine applies only to the second group of cases and then only to the extent of determining the one question of whether or not the defendant was negligent. Negligence being established the doctrine becomes surplusage. It is never applied so as to hold that the *specific accident* must be foreseen, nor the *manner* of its happening, nor the resulting *injury* nor the *extent* thereof; and the fact that an unusual result follows is immaterial.

The act of omission or commission is to be viewed as through the eyes of a theoretical man—that fictitious reasonable and prudent person judging the actions by what such a person would have done under the same circumstances. *If it be found he acts contrary to what such a person would have acted, causing injury, flowing naturally and directly, in an unbroken chain without an intervening, efficient independent cause interrupting, then he is liable. His liability is for whatever would probably result in any or some injury, of any or some kind, to any or some person. If the injury lands anywhere in this field, in such an unbroken chain, such negligence is the proximate cause and the defendant is liable without regard to whether the negligent man did in fact foresee the particular person, the particular accident, the particular injury or the particular further result.*

On the same reasoning there is nothing in anticipation and remoteness—these variations of unforeseeness—excepting to eliminate superfine philosophies and refinements beyond common reasoning, which sophists sometimes urge to try and build up and establish negligence. When they get *so fine that there is no negligence,* the theory is good.

Now, *just plain common reasoning* is the backbone of this case and all such cases. Was there negligence? Was the plaintiff injured as a direct result of this negligence?

Milwaukee & St. Paul Ry. Co. v. *Kellogg,* 94 U. S. 469, quoted by Petitioner, does not bear him out, but on the contrary sustains our verdict.

This is the case where it was charged defendant negligently approached his own tall inflamable elevator with his own boat on the Mississippi River, while emitting sparks and in a high wind blowing towards his elevator. The elevator burned and from this plaintiff's sawmill and lumber 388 feet away caught fire. The defendant on account of this great

distance asked an instructed verdict on the ground the last burning was too remote from the negligent approach to the elevator as stated. The trial court refused this and left it to the jury to find whether the burning of the mill and lumber was naturally and reasonably to be expected under those circumstances, and whether this happened without the aid of other causes not reasonably to be expected.

There was no question about it being negligence to approach even his own inflamable elevator with sparks emitting from his boat when a high wind was blowing toward it.

The point they make was that because plaintiffs' mill and lumber was 388 feet from the elevator it should not be considered as an approximate result forseeable.

This court said (bearing in mind that the primary act was negligent):

> "Did the facts constitute a continuous succession of events so linked together as to make a natural whole or was there some new and independent cause intervening *between* the *wrong* and the *injury?*"

The above statement directly followed the statement of the refusal of the court to instruct as a matter of law, and the statement of what the trial court did in fact instruct, which was this court's announcement of the governing principles.

The court then said as a proviso to these general principles regarding "continuous whole" what Petitioner quoted, to-wit:

> *"But* it is generally held that in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury it must appear that the injury was the natural and probable consequence of the negligence or wrongful act and that

it ought to have been foreseen *in the light of the attending circumstances.*"

Then applying this proviso the court said that these circumstances were the velocity and direction of the wind, the dry season, sparks, height of elevator and all. The court says *under those circumstances* the defendant would *expect more danger* than at another time and under different conditions.

Then, as a second proviso, the court says:

> "We do not say that *even* the natural and probable consequences of a wrongful act or omission are in *all* cases to be chargeable to the misfeasance or non-feasance. They *are not* when there is a sufficient and independent cause operating *between* the wrong and the *injury.*"

Now, see how this court brings it back to the fundamental principles of "continuous succession" of events and after dealing with above provisos, the court says:

> "*But when there is no* intermediate efficient cause the original wrong must be considered as reaching to the effect and proximate to it. The inquiry must therefore *always be* whether there *was any intermediate cause* disconnected from the primary fault and self-operating which produced the injury."

This close analysis contrasts with remarkable clearness with cases where the doctrine of unforeseeness and anticipation has been applied in improper places by legal refinements and acute minds.

The real question of that case, was, did this fire naturally flow from the one *wrongfully* set or did some other independent agency communicate it across? There was no intervention.

The case at bar comes within the first group of cases where the act complained of is a *violation of a positive duty* and *an act of Congress* requiring safe and sufficient material and

making them liable for any negligence. Anticipation was not necessary to be proven. It was enough that an injury occurred through the failure of the master to perform the positive duties of furnishing safe materials properly inspected. The courts through the announcement of the duties of the master did the foreseeing in all such cases.

As a matter of fact if this case was within the second group of cases for negligence—due to failure to do what a reasonably prudent person would do under the circumstances—liability could not be avoided under the facts proven. Indeed the facts are so strong that there would be liability under Petitioner's reasoning because a probable injury should have been foreseen from a neglect to inspect and reject a wire with a copper cylinder attached when found as mere flotsam and jetsam in an empty coal car.

Briefly stated, the Kellogg case held: Whether a defendant should have foreseen ill-effects from his conduct is a question of fact for the jury. This is true even where connected with independent circumstances, unless it clearly appears that the extraneous circumstances constituted an efficient independent cause from which the effects would have flowed even in the absence of defendant's conduct. Where the effect, however, flows in an unbroken chain from defendant's conduct, without efficient cause intervening, the defendant's conduct will be held to be the proximate cause of the effect.

In the case at bar the negligent act of finding wire from questionable source and of failure to inspect and test being both shown and admitted in the answer and no independent efficient intervening cause whatsoever, being shown the question was properly submitted to the jury.

As before stated the "unforeseen" and "unanticipated" tests are used only for the purpose of determining *negligence*. If negligence can be and is established independently of these tests then these tests are surplusage and never resorted to.

In the case at bar negligence was established by proof of failure in furnishing safe materials and a failure to inspect. Although the presence of the cap upon the wire and the place of its procurement were both circumstances involving this duty which as hereinbefore shown, made the failure of the master to perform these duties guilty of culpable negligence.

(d) ASSUMPTION OF RISK.

At page 52 of his brief Petitioner advances the claim that Respondent assumed the risk of the injuries he received. He cites the following four cases which will be forthwith considered:

Jacobs v. *S. R. R. Co.*, 241 U. S. 229: Deceased, while carrying a water cooler in his arms, attempted to run along the track and board a moving train at a place where he *knew* it was customary to scrape out cinders. This was a case involving *known* dangers and is not an authority in the case at bar where the master's negligence and dangers were both *unknown* to Respondent.

Prior v. *Williams*, 254 U. S. 43, the claw bar case, has no application because the case went off on instructions. It was not assumption of risk as a matter of law or the court would have ended the case instead of remanding it. It was held to be a question for the jury under proper instructions as to whether a reasonable person in the same situation would or would not have used the claw bar. In the case at bar it was all submitted to the jury upon evidence of negligence. This case is an authority, however, that the question is a jury question.

Vanderpool v. *Partridge*, 79 Neb. 165: Plaintiff was injured by a chisel he saw made from a rasp and knew to be unsafe and dangerous which fact he did not complain of to the master. He was not ordered to use this specific tool.

Under such circumstances it was rightly held he assumed the risk. The case is not an authority for the case at bar, as Respondent had no such knowledge as plaintiff in this case had.

Boldt v. *Pa. R. Co.*, 245 U. S. 441: This case held that the employee assumed such risks as are "fully known and appreciated by him." This rule has no applicability to the case at bar for the very material reason that Respondent did not "fully know, or appreciate" the dangers to which Petitioner's negligence had subjected him. It is an authority only that Petitioner would have assumed the *ordinary* risk such as scratching his hands or face or tripping over the material while handling it—not the extraordinary dangers created by the Petitioner's own negligence.

The case at bar is not governed by the above authorities—but fall entirely within other rules of law, as will clearly appear from the following:

This was a question of fact for the jury.

Respondent was injured as a result of the master's own negligence creating an extraordinary danger of which Respondent had neither knowledge or warning of the dangerous materials furnished him with specific directions to use and of which hidden dangerous condition he had no opportunity to acquaint himself. Having neither knowledge of the master's negligence nor the dangerous condition of the material Respondent did not assume the risk.

This court stated in *Reed* v. *Director General*, 66 L. Ed. 480, 481:

> "In actions under the federal act, the doctrine of assumption of risk certainly has no application when the negligence of a fellow servant (or master) which the injured party could not have foreseen or expected, is the sole, direct, and immediate cause of the injury. To hold otherwise would conflict with the declaration of Congress

that every common carrier by railroad, while engaging in interstate commerce, shall be liable to the personal representative of any employee killed while employed therein, when death results from the negligence of any of the officers, agents, or employees of such carriers."

Respondent was injured by this dangerous material, procured without his knowledge from the rubbish in a coal car, furnished him, uninspected, by the Petitioner for a specific use. His injuries flowed directly from this negligence—and Respondent neither knew nor could be expected to find out in that instant of time the danger resulting from the master's violation of his positive duties. To the contrary, Respondent relied and had the unqualified right to rely upon the assumption that these duties had been fully performed by Petitioner, as shown by the following authorities:

18 R. C. L., Mas. & Ser. pars. 138 and 91.

In *Chicago, R. I. & P. R. Co.* v. *Ward,* 64 L. Ed. 430, 433, this court said of a brakeman thrown from the top of a freight car:

"* * * As to the nature of the risk assumed by an employee in actions brought under the Employer's Liability Act, we took occasion to say in *Chesapeake & O. R. Co.* v. *De Atley,* 241 U. S. 310, 315 * * * 'According to our decisions, the settled rule is not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.' The Federal Employer's Liability Act places a co-employee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk. (Citations.) Applying the principles settled by these decisions to the facts of

> this case, the testimony shows that (Respondent) had neither warning nor opportunity to judge of the danger to which he was exposed by the failure of the master to perform his positive duties."

Quoted in *Johnson* v. *U. P. R. Co.*, 196 N. W. 140.

In *Union Pacific* v. *O'Brien*, 40 L. Ed. 766, 771, this court said:

> "The servant undertakes the risks of the employment as far as they spring from incident to the service, but he does not take the risks of the negligence of the master itself."

In *Choctak etc. Co.* v. *McDade*, 48 L. Ed. 96, 100:

> "The servant assumes the risks of dangers incident to the business of the master but not of the latter's negligence * * *. The servant has a right to assume the master has used due diligence to provide suitable appliances in the operation of his business and he does not assume the risk of the employers' negligence in performing such duties. The employee is not obliged to pass judgment upon the employer's methods of transacting his business but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. * * *"

See also:

> Roberts, Fed. Lia. of Car., pp. 993, 990, 987.
> *Union Stock Yards Co.* v. *Goodwin*, 57 Neb. 138.
> *Cinn. I. St. L. & C. R. Co.* v. *Roesch*, 126 Ind. 445.
> *Balt. & Ohio R. Co.* v. *Baugh*, 37 L. Ed. 772, 781.

So in the case at bar, Respondent had no duty to ascertain from what source the master had procured the wire, nor the master's determination that it be used without inspection or test or inquiry as to what the cylinder on the end of it really was. Moreover, he had the right to assume proper inspection and test had been made, and it was entirely fit for use. This is established in the case of *Texas &*

Pacific R. Co. v. *Archibald,* 42 L. Ed. 1188, in which this court held:

> "The elementary rule is that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise or ordinary care, and that the employee has a right to rely upon this duty being performed, and that whilst, in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty (inspection) owing to the employee with respect to appliances furnished."

Even had Respondent a knowledge of the source from which this material was obtained with no knowledge that it had not been inspected and tested, he would not have assumed the risk as shown by the following from the syllabi in *Texas & Pacific R. Co.* v. *Archibald, supra*:

> "An employee of a railroad company has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because, by ordinary care, he might have known of the methods, and inferred therefrom that danger of insufficient appliances might arise."

This case was followed in a great number of cases as shown by Rose's notes, among them being the following cases permitting recovery where master had failed in duty of inspection (some emphasize the fact the question is one of fact for the jury):

Francis v. *Cramp & Co.*, 200 Fed. 383-386.
Miller v. *Missouri etc R. Co.*, 169 Fed. 567-570.
Bunker Hill etc Co. v. *Jones*, 130 Fed. 813-819.
Maloney v. *Winston Bros. Co.*, 18 Idaho 740- 751.
Miner v. *Franklin Co. Telephone Co.*, 83 Vt. 311-320.
Kiley v. *Rutland R. Co.*, 80 Vt. 536-548.

Nor did the duty devolve upon Respondent to discover the danger. Anything short of positive knowledge of the danger is insufficient.

> "The charge of the court upon the assumption of risk was more favorable to plaintiff in error than the law required, as it exonerated the railroad company from fault, if in the exercise of ordinary care, McDade might have discovered the danger. Upon this question *the true test is not in the exercise of care to discover danger,* but whether the defect is known or plainly observable by the employee."
>
> *Choctaw etc. Ry. Co.* v. *McDade,* 48 L. Ed. 96, 100.

In *Mather* v. *Rillston,* 39 L. Ed. 464, a young man, inexperienced as a miner, but employed to operate the machinery in a house, for lowering timber into an iron mine and knowing little of the explosives used in the mine for blasting was permitted to recover from the operators of the mine for personal injuries to himself occasioned by their bringing into such house and storing therein near a steam heater a large quantity of giant powder or dynamite and these blasting caps which being jarred by the machinery and overheated by the steam and steam pipes suddenly exploded. It was held he did not assume the risk as he had not been informed of the increased risk and knew nothing of the special dangers resulting. In its opinion this court specifically noted the extreme sensitiveness and power of these fulminate caps (p. 467). It is not enough that Respondent had as good an opportunity as the Petitioner of knowing of the existence of the danger created by the master's negligence.

Texas & Pacific Ry. Co. v. *Archibald, supra.*

Yazoo & M. V. R. Co. v. *Dees,* 83 So. 613.

Respondent is not to be charged with scientific or technical knowledge as to what the cylinder was—no duty of inspection or test rested upon him. On the other hand, the Petitioner having the duty of inspection and test is so charged.

McGill v. *Mich. S. S. Co.,* 144 Fed. 788, supra, p. 78.

Respondent had no knowledge of the suspicious source from which this material had been obtained. He could not have assumed that risk. He did know that it had been presented to the foreman for his approval and had heard the foreman approve it with the admonition that its *quantity* might be insufficient; he did know that in addition his fellow-workman—older in years and experience—passed it to him for use. He had every reason to believe that the material was safe or it would have been discarded by his two superiors and not accepted for use. Respondent was but a mere boy, only 18 years of age, with no knowledge concerning the instrumentality nor any source or method by which to inspect or test it even had he desired so to do. All he could possibly have done would have been to again call it to the attention of the two superiors who had already passed upon it. Under these circumstances he proceeded to use the wire in accordance with the master's positive directions and in so doing was injured. Under the authorities considered, Respondent did not assume the risk. He was acting entirely within his rights, for, as above shown, he had the right to rely that the master had fully performed his duty of inspection and test and that the material was entirely safe, fit and proper for the use given him. He did not assume the risk as he had no knowledge of the master's negligence, nor of the unusual danger it created.

D. IN INTERSTATE COMMERCE.

(a) **Gantry.**

This gantry, a traveling crane, used to pick up heavy loads in cars and move them from a bad order car on one track to a good order car on a parallel track—is a unique bridge necessary to move interstate commerce. It stands there permanently while rope slings, chain slings and cable slings are a necessary part thereof, without which the rest of the machinery would be useless—just as bridges would be im-

paired without new bolts and materials to keep them in repair so as to be continued in use.

A gantry is unlike a refrigerator car or an engine that *may* be used for either interstate or intrastate commerce and not yet actually in use, because a gantry like a main track or bridge used for both kinds of traffic is constructively *always* in use for interstate business. It must always be ready for moving interstate traffic and any work for one kind of traffic involves the same work for the other. It is unlike an engine that may be and is withdrawn from interstate traffic and entered in intrastate service. Of course, an old gantry actually in use is different from a new one not yet being used.

The old cable sling had been broken in service and lost and this cable sling materia had been brought up into immediate connection and use upon this gantry then in use. Moreover, the specific act was a necessary preparatory act in the movement of an interstate car of poles brought to the gantry and temporarily halted for this preparatory act necessary in moving across the state line to its destination.

On page 33 Petitioner asserts the record does not show gantry used *exclusively* in interstate commerce. We do not have to show a bridge or track is used *exclusively* in interstate business to bring it within the act if it was being used necessarily for interstate service. The evidence was that none of its employees knew of the use of this crane for any intrastate hauling and that all the use they had ever known of, was in interstate shipments and that this particular load of poles being move by these acts of repair was in sending these poles on their way from Minnesota to Nebraska. In fact, Petitioner admits this in his answer (Rec. p. 54).

Even had it been occasionally used for intrastate traffic (which was not shown by any evidence) its character as an instrument of interstate commerce would not be destroyed.

Pedersen v. *Delaware, Lack. & West. R. Co.*, 57 L. Ed. 1125.

N. Y. Cent. & H. R. R. R. Co. v. *Carr*, 238 U. S. 260 (both cars).

Erie R. Co. v. *Winfield*, 244 U. S. 170.

Lombardo v. *Boston & M. R. Co.*, 223 Fed. 427.

We quote a part of our testimony, first to show gantry in interstate business and second the immediate connection of this sling with the repair of this operating gantry and also to show it was a preparatory act in the present movement of an interstate shipment, to-wit (Rec. p. 40):

24 Q. "When you speak of loaded cars that were usually brought in under the gantry for removal, were those removals from cars that were in local hauls within the state, or are these cars from through trains moving from state to state?"

A. "They were going out of the state, most of them, they come in from other state and go out."

25 Q. "Before you were hurt what was the last car that was unloaded?"

A. "A carload of sheet iron."

26 Q. "Was that a through car?"

A. "Yes sir."

27 Q. "And this came from outside of the state and coming through?"

A. "Yes sir."

28 Q. "And what next was to be moved, or do you know?"

A. "There was to be a carload of telegraph poles to the gantry that could not be reached yet and they were to be shoved by the engine *as soon as we could get an engine.*"

29 Q. "They were not within reach of the gantry?"

A. "No."

30 Q. "But they were inside the yard?"

A. "Yes sir."

31 Q. "Had you received information that they would be pushed down next?"

A. "Yes sir. The foreman said it would be the next car."

32 Q. "What was necessary to be done in *preparation* for handling that load to go on its journey?"

A. "It had had a rope sling on to it for some time, and the foreman said it would not be strong enough, and he said they would have to make a steel cable to *transfer the poles;* that they were too heavy for the rope.

33 Q. "After that statement was made was there any direction given with reference to making that sling?"

A. "The foreman said to get the cable out of the shanty that we *had put in there,* and cut off a piece that would be large enough to make a cable sling."

34 Q. "Who got it, if you know?"

A. "I do not know exactly who got it from the shanty."

Record, page 55:

262 Q. "Did you have any other slings on the job at all there?"

A. "Yes, there was a rope slihg and a chain sling."

263 Q. "And do you know why it was that one of those was not used for this particular load?"

A. "Well, sir, the rope sling was not heavy enough, and the chain sling would scar the poles by lifting them up with it."

264 Q. "Now, after the order was given by the foreman to make this cable, what if anything was done?"

A. "The men went in and got the cable and brought it out there to—and cut off enough to make the sling out of."

265 Q. "Where did they get the cable?"

A. "Out of the shanty."

266 Q. "Was it a new cable or old?"

A. "It was an old cable that *had been used* there by the hoist at one time."

275 Q. "What, if anything was done?"
A. "He told us we would have to get some wire and cloth to put around the ends of it to keep from scratching our hands."

276 Q. "Who told you that?"
A. "The foreman."

277 Q. "In putting the clamps on the cable where was the cable at the time the clamps were put on?"
A. "We had it on the ground. After we *got the clamps* on, part way, enough to hold it, we put it around the end of the coupler on the car and *up on the hoist,* and *raised it up to tighten it.*"

278 Q. "At that time you say the foreman said something about getting rags and binding them on the end of the cable?"
A. "Yes sir."

279 Q. "Did he do anything after that—the foreman?"
A. "He went up in the cab, and tightened up the cable, that was all."

280 Q. "He went in the cab?"
A. *"To tighten up the sling."*

281 Q. "What, if anything, was done with reference to procuring some cloth and wire?"
A. "He told someone to get some wire and cloth."

282 Q. "Did anybody get it?"
A. "They got some cloth, *but there was no wire there.*"

283 Q. "Was there any wire on the job? "
A. "There was some heavy wire there, but it wasn't anything that you could wrap around the cable."

284 Q. "Did everybody know about the condition of affairs there?"
A. "Yes sir. That was the way about all the time."

285 Q. "Do you know whether the foreman knew that?"
A. "I suppose he did, the rest did."

286 Q. "Do you know whether the fact that wire was not on the job there had been reported to the foreman that day?"

A. "I don't know. I would not say it was not."

287 Q. "When he asked someone to get the wire, was the wire procured?"

A. "Yes sir, my father told—he told us that he had found some if there wasn't any there. My father said he had seen some that morning in that car with the sheet iron that they unloaded, and he went up and got that."

288 Q. "Your father got in the car and got the wire?"

A. "Yes sir."

289 Q. "And then what, if anything, did he do?"

A. "He asked the foreman if that was all right."

294 Q. "After you got the wire you say your father showed it to the foreman?"

A. "Yes sir."

295 Q. "I wish you would show the jury how it was displayed to the foreman?"

A. "What?"

296 Q. "How it was displayed to the foreman?"

A. "He held it up to the foreman and asked him if it was all right (witness illustrating)."

297 Q. "You saw him do that?"

A. "Yes sir."

298 Q. "And you heard him say that?"

A. "Yes."

299 Q. "What, if anything, did the foreman say?"

A. "He said it was all right, but there would not be enough of it. My daddy said it will have to do because that is all there is."

Record, page 61:

371 Q. "I will ask you what your duties at the gantry at that time, yours and that of the crew in which you were?"

A. "Transferring heavy material."

372 Q. "What?"
A. "The transferring of material from bad order cars into good ones, and fixing loads."

373 Q. "Transferring and fixing the loads?"
A. "Yes sir."

374 Q. "What do you mean by fixing them?"
A. "Sometimes a load would get out of shape on a car and before it could be forwarded it had to be straightened before it could proceed on its journey."

375 Q. "What was the character or the nature of the material that was being transferred or fixed in these cars?"
A. "Practically everything."

376 Q. "What?"
A. "Pretty near everything in the shape of heavy material. Guns, automobiles, tractors, steel, engines, and stuff like that."

377 Q. "No light stuff?"
A. "No."

378 Q. "How many loads would you handle in a day?"
A. "It depends on the condition of the load."

379 Q. "Did you ever have occasion to notice the tagging on the cars?"
A. "Sometimes the mans' name or the manufacturer was on, and sometimes it was not."

380 Q. "Did you ever get orders to, and did you ever transfer a load that originated in Iowa and that ended in Iowa, that was handled by your gantry?"
A. "I think not, no."

The work and material was immediately connected with this interstate aerial bridge or gantry actually in use and was being used then—was actually hooked upon the gantry as a part of it and the fixing or adjusting was directly connected with the movement of that particular car of poles in interstate movement as well as for movement of other interstate cars to follow.

It was more than a preparatory act but on actual moving act as much as the man that throws the switch for an interstate engine standing only for the switch to be thrown. Foreman Turner testified they were actually working on this shipment.

(b) As to John O'Hara's work.

Petitioner suggests on page 33 that as they had nothing to do they were making a sling, but evidence was in the record that the rope sling on hand was not strong enough and a chain sling would scar these telegraph poles—so this sling had been made and was even hooked on, in place, and had become a part of the gantry—a repair of an existing aerial bridge then being used in interstate commerce.

Petitioner at one time tried to show John was a volunteer and then again that he was at play and not at work of any kind either interstate or intrastate but indulging in idle curiosity, although defeated by the jury upon these suspicions injected into the trial against overwhelming proof. Then on the last two pages of his brief Petitioner tries to argue that the work he was doing was not in interstate commerce *even if assisting in adjusting this sling.* He attempts to segregate the sling from the gantry and call it a new instrument intended for, but not being in use, within some of the decisions on new trestles, new engines and new stations never having been opened to service and still independent of interstate commerce.

The test to determine whether Respondent was engaged in interstate commerce when injured has been determined by this court to be as set forth in the following cases. The leading case is *Pederson* v. *Delaware etc. R. Co.*, 57 L. Ed. 1125 (carrying bolts to the bridge), the court said:

> "Among the questions which naturally arise in this connection are these:

"Was the work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?

"Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier?"

To the same effect,

So. R. R. Co. v. *Puckett,* 244 U. S. 571.

"Generally where applicability of the Employer's Liability Act is uncertain, the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it."

So. Pac. Co. v. *Ind. Acci. Comm.,* 64 L. Ed. 258.

"* * * This movement was simply for the purpose of reaching and moving an interstate car, the purpose would be interstate. *The difference is marked between a mere expectation that the act done would be followed by other work of a different character and in Ill. Cent. R. Co.* v. *Behrens,* 233 U. S. 473, 478, * * * and the *doing the act for the purpose of furthering* the later work (interstate commerce work)." Citing Carr Case.

L. & R. Ry. Co. v. *Parker,* 61 L. Ed. 119.

"Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury the employee is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof."

N. Y. Cent. & H. R. R. Co. v. *Carr,* 238 U. S. 260.

The case at bar falls squarely within these tests.

In accordance with these tests this court has held:

1. The work of keeping instrumentalities used in inter-

state commerce in proper state of repair is so closely connected with such commerce as to be part of it.

Pederesen v. *Delaware etc. R. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125.

Lombardo v. *Boston & M. R. Co.*, 223 Fed. 427.

Thomas v. *Boston & M. R. Co.*, 219 Fed. 180.

Deal v. *Coal & Coke R. Co.*, 215 Fed. 285.

2. Preparatory acts for the purpose of furthering interstate commerce movement are in interstate commerce:

> "From the facts found, it is plain that the object of clearing the tracks entered inseparably into the purpose of jacking up the car, and gave the operation the character of interstate commerce. The case is controlled by *Pedersen* v. *Del. etc.*, which holds that a workman employed in maintaining interstate tracks in proper condition while they are in use is employed in interstate commerce; *the other cases are to the effect that preparatory movements in aid of interstate transportation are a part of such commerce within the meaning of the act.* (With citations there given)."
>
> *So. R. Co.* v. *Puckett*, 244 U. S. 571.

In *No. Car. R. Co.* v. *Zachary*, 232 U. S. 248: An employee oiling an engine which was to go on an intrastate journey, and while hauling two empty freight cars that had come from without the state.

In *St. L. S. F. & T. R. Co.* v. *Seale*, 229 U. S. 156: A seal clerk in a division yard, inspecting and listing seals on an interstate train, *preparatory* to the distribution of its cars to other trains.

In *Norf. & W. R. Co.* v. *Earnest*, 229 U. S. 114: Fireman walking ahead of and piloting through several switches, a locomotive which is to be attached to interstate train and to assist in moving the same up a grade.

In *N. Y. C. R. Co.* v. *Carr,* 238 U. S. 260: Where brakeman on train consisting of several interstate and two of intrastate freight, is assisting in securely placing the latter on a sidetrack at an intermediate station to the end that they may not run back on main track and that train may proceed on journey with interstate freight.

In *M. K. & T. Ry. Co.* v. *U. S.,* 231 U. S. 112: An employee, who is waiting for the train to move and liable to be called and who is not permitted to go away, is on duty.

> "They are none the less on duty when waiting. Their duty was to stand and wait." (p. 119).

In *So. Pac. Co.* v. *Indust. Acct. Comm.,* 64 L. Ed. 258: Electric lineman wiping insulators on main cable running from power house to a reduction and transforming station, whence current ran to trolley wires and thence to motors of carrier's cars engaged in both intrastate and interstate commerce, was in interstate.

In *So. R. R. Co.* v. *Puckett,* 244 U. S. 571: Plaintiff car inspector engaged in inspecting cars when wreck occurred among other cars nearby, blocking track and pinning man beneath car. Plaintiff went to get blocks to jack car up and was injured. Held while primary object to rescue fellow employee, yet was also for purpose of clearing interstate track of wreck and was in interstate commerce. Refers to preparatory acts as within employment.

In *Louisville & Nash. R. Co.* v. *Parker,* 242 U. S. 13: Plaintiff's intestate fireman on switch engine moving on switch track, transferring an empty car from one switch track to another, *which car was not moving in interstate commerce, but as* movement was simply for purpose of reaching and moving an interstate car, *the purpose controlled* and plaintiff's intestate was held in interstate commerce.

> "The difference is marked between a mere *expectation* that the act done would be followed by other work of a

different character * * * (citing *Ill. Cent.* v. *Behrens*) * * * and doing the act for the purpose of *furthering* the later work. (Citing)."

In *Johnson* v. *So. Pac. Co.,* 196 U. S. 1: A dining car regularly engaged in interstate traffic does not cease to be so when waiting for the train to make the *next trip.*

In *N. Y. Co.* v. *Porter,* 249 U. S. 168: A laborer shoveling snow between main line and platform at a station where tracks used for transporting both intrastate and interstate commerce, in interstate business and governed by Pedersen case.

In *Walsh* v. *N. Y. N. H. & H. R. Co.,* 223 U. S. 1: Car repairer replacing draw bar in a car then in use in such commerce.

Work being performed by O'Hara at time of injury was *preparation of gantry* which was being and had been long used for interstate freight, to transfer a waiting shipment of interstate freight, falls within the rule of preparatory acts of shipment—besides being work of repair on interstate instrumentality as stated above.

Transfer of interstate shipments from cars which have become in bad order in transit, to cars in good order, is as much a part of interstate transportation as the original loading thereof, and the placing of the shipment in cars is as essential to interstate transportation as is the having of cars in which they move or the engines and power by which moved, or the tracks and bridges over which they are hauled and such loading or transferring in transit under such circumstances is a true act of interstate commerce.

The particular repair of this gantry and its preparation to handle this particular load of interstate freight is a true act of interstate commerce.

(c) **Question for jury.**

Pitts C. C. & St. L. R. Co. v. *Glinn,* 219 Fed. 148.
Nor. Car. R. R. Co. v. *Zachary,* 232 U. S. 248.
Penn. Co. v. *Donat,* 239 U. S. 50.
L. & N. R. Co. v. *Parker,* 242 U. S. 13.

If this was a jury question it should not now be called a federal question.

We submit the court should affirm the decision of the court below or dismiss the writ of certiorari.

Respectfully submitted,

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